

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,

Plaintiff,

Civil Action
No. 14-14176-ADB

v.

October 17, 2018

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, et al.,

Pages 1 to 230

Defendants.

TRANSCRIPT OF BENCH TRIAL - DAY 3
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Allison D. Burroughs, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on October 17, 2018.)

THE CLERK: All rise. Court is in session. Please be seated.

THE COURT: All right. I have to apologize because I did not look at this binder until I got home last night, and then I realized I actually had no idea what I was supposed to be it doing with it. There's a bunch of witnesses in here, right?

MS. HACKER: That's correct, Your Honor. There's eight witnesses.

THE COURT: Which ones was I supposed to be looking at for today?

MS. HACKER: We can give you an order of what we expect to get to first. Just to orient Your Honor, the objections that you need to rule on are highlighted in there so that you can just flip through easily and just find the highlighting.

THE COURT: So that's what I tried to do last night. I decided I was just going to do all of them because

1 I didn't know which one you wanted. So I started with Cheng.
2 Do I have the larger deposition transcript for context? Or
3 is this what you've given me?

4 MS. HACKER: We've given you just the clips that
5 the parties have designated. We can certainly provide the
6 larger transcripts. I will warn you it will be a much larger
7 binder.

8 THE COURT: Let me give you a for-instance on why
9 I'm asking. Just for an instance, if you look at page 8 of
10 22 of Cheng. So it starts off with the witness saying, "I
11 don't know what this document is," and then there's a series
12 of questions, all of which I think the objection should be
13 sustained to because the witness says she doesn't know what
14 the document is.

15 But then I get to the middle of that page 8 where
16 it says page 9, lines 1 to 4, and it says, "Back to the
17 spreadsheet." And I can't tell if we're going back to the
18 same document or there's been a new document introduced
19 between the highlighting on the top of the page and that
20 highlighting. Because if it goes -- just as an example, if
21 it goes back to the same document that she says she can't
22 identify, I'm going to sustain those objections. But if
23 we're talk willing about a different spreadsheet that she has
24 some foundation for, I would overrule that objection.

25 MS. HACKER: Understood. I think the confusion may

1 be with the exhibits. So we can provide Your Honor a binder
2 with all the exhibits that are referenced in these. We
3 actually have those now, but we anticipated handing them out
4 as we read through and offer the exhibits individually, as
5 we've been doing with witnesses. But that may help clear up
6 the confusion with, at least with Ms. Cheng's deposition.

7 THE COURT: Right there, it wouldn't help me
8 because there's no exhibit number. When it's "back to this
9 spreadsheet," is that the same exhibit that we've been
10 talking about or is it a different exhibit?

11 MS. ELLSWORTH: It's the same spreadsheet, Your
12 Honor.

13 THE COURT: The other one says it's a -- it looked
14 to me it was a survey monkey.

15 MS. ELLSWORTH: From my memory from being in the
16 deposition, it was the same spreadsheet that was being
17 inquired about.

18 THE COURT: When I started to confuse myself there,
19 I wondered if there was something else that I was supposed to
20 have to give myself some context on these.

21 Anyways, the long and short of it was I threw in
22 the towel on the whole project last night. I will try and --
23 we can take a break if we need to.

24 Who is the next witness? Is it Cheng?

25 MS. HACKER: For priority order, I would say first

1 let's address Lucerito Ortiz and second Fabio Zuluaga. I
2 believe those have less objections and less exhibits to deal
3 with, so hopefully those will go by quickly. We don't
4 anticipate getting to those witnesses today.

5 THE COURT: Ortiz. Who is the other one? Zuluaga?

6 MS. HACKER: Exactly.

7 MS. ELLSWORTH: Your Honor, we object in full to
8 Mr. Zuluaga. He's the principal or the designee from the
9 Thomas Jefferson High School. We have objected in full to
10 the relevance of the testimony which doesn't relate to
11 Harvard admissions at all. It relates to the ethnic makeup
12 of that particular high school and some numbers that
13 Mr. Zuluaga had no foundation to testify to. We've also put
14 individual objections into some of the snips, to the extent
15 that Your Honor overrules the general relevance objection.

16 THE COURT: I'm happy to get to these either later
17 this afternoon or tonight and hope that I can get through the
18 whole binder. But just as I started, it just occurred to me
19 that I might be missing something.

20 MS. ELLSWORTH: Your Honor, the other two witnesses
21 to whom Harvard objects in full is Ms. Pedrick and Ms. Lopez.

22 THE COURT: Okay. And who is the next witness? Is
23 it Ortiz?

24 MS. HACKER: Ortiz would work for us, Your Honor.

25 THE COURT: Who are you calling next?

1 MR. MORTARA: Your Honor, the next live witness --
2 there will be no deposition testimony read today. The next
3 live witness is senior admissions officer Christopher Luby.

4 THE COURT: If I get through these tonight rather
5 than during the lunch break, that will suffice for everyone?

6 MR. MORTARA: Yes. And if we're not done at the
7 end of the day with live witness testimony, we'll be prepared
8 to start reading depositions at the end of live testimony
9 tomorrow and fill in that, if there's gap time at the end of
10 every day, until we finish with those.

11 What we'll start doing is advising you about what
12 deposition designation reading might go on on any particular
13 day so you're not faced with a massive binder not knowing
14 which one is which.

15 THE COURT: These didn't look -- at least the ones
16 I went through, they didn't look overwhelming. So I'll try
17 and get through them today. How do you want my to convey the
18 information back to you?

19 MS. HACKER: Whatever is most convenient for Your
20 Honor. If you'd like to just rule on the record, we can keep
21 track as you go through. If you'd like to hand us back
22 copies, we can look through them with our colleagues on the
23 other side. We don't have a preference. Whatever is easiest
24 on Your Honor.

25 THE COURT: Do you all have a preference?

1 MS. ELLSWORTH: No. Whatever you prefer.

2 THE COURT: Let me take a look at them tonight and
3 see exactly what we're talking about, and I will do at least
4 a chunk of it tonight if not all of it. All right? Okay.

5 MS. ELLSWORTH: Thank you, Your Honor.

6 THE COURT: Sorry about that. I should have looked
7 at it before I left and I didn't. Okay.

8 Where is the dean?

9 THE WITNESS: Your Honor, good morning.

10 THE COURT: You can resume your position.

11 MR. HUGHES: Good morning, Dean Fitzsimmons.

12 Before we get started and resume the examination of
13 the dean, there's an evidentiary matter that I anticipate is
14 going to come up right away that I'd like to handle before we
15 get going. I'd prefer actually to do that either at sidebar
16 or somehow outside the presence of the witness. I'm just
17 concerned the discussion of the objections could be better
18 had not in front of the witness.

19 MR. LEE: Sidebar would be fine, Your Honor.

20 THE COURT: I'll see you at sidebar.

21 (The following was held at sidebar.)

22 [Sidebar redacted.]

23 THE COURT: Dean Fitzsimmons, you remain under
24 oath.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: Whenever you're ready, Mr. Hughes.

2 MR. HUGHES: Thank you, Your Honor.

3 (WILLIAM FITZSIMMONS previously sworn by the Deputy
4 Clerk.)

5 DIRECT EXAMINATION (resumed)

6 BY MR. HUGHES:

7 Q. Good morning, Dean Fitzsimmons. Hopefully we'll get
8 through this morning without a fire alarm.

9 A. Let's hope.

10 Q. Let's go to a new topic. During each admission cycle,
11 the admissions office maintains something called the dean's
12 interest list, correct?

13 A. That's correct.

14 Q. The dean that's referred to on the dean's interest list
15 is you, right?

16 A. It would be.

17 Q. And that is a list that you use to make sure that you are
18 aware of what happens to particular applicants to Harvard,
19 correct?

20 A. That's correct.

21 Q. And so if there's going to be an action up or down on one
22 of the candidates on the dean's list, the people in your
23 office are supposed to keep you in the loop on that, right?

24 A. Well, I'd be in the loop anyway. But I would want to
25 know because I'm a member of the committee.

1 **Q.** And one category of applicants that get on the admission
2 list or the dean's interest list are the children of donors,
3 correct?

4 **A.** That's certainly some of the people on the list.

5 **Q.** Not only just children of donors but relatives of donors,
6 other relatives of donors, correct?

7 **A.** It could be.

8 **Q.** And what is the Harvard development office?

9 **A.** The Harvard development office is a part of Harvard that
10 tries to raise funds for the advancement of Harvard for all
11 the research purposes and all the other -- and our world's
12 scholarships, among other things.

13 **Q.** And sometimes the development office communicates with
14 you about getting somebody on the dean's interest list,
15 correct?

16 **A.** They'll communicate with me about individuals, and I will
17 sometimes put them on the list.

18 **Q.** And sometimes you'll put them on the list if the
19 development office asks you to, regardless of whether they
20 are otherwise a strong candidate for admission, correct?

21 **A.** Until we actually look at the applications, we certainly
22 don't know who will be a strong applicant, and they certainly
23 don't.

24 **Q.** So does that mean you'll put candidates on the interest
25 list even if you don't know whether they're a strong

1 applicant?

2 **A.** It could be well in advance of any of the application
3 deadlines.

4 **Q.** Let's talk about your relationship with the donors at
5 Harvard. Is part of what you do in your role as dean in the
6 admissions office, do you sometimes meet with Harvard donors?

7 **A.** Yes, that's right.

8 **Q.** Do you ever socialize with Harvard donors?

9 **A.** Occasionally people I may know over the years.

10 **Q.** Do Harvard donors ever take you out to dinner?

11 **A.** No.

12 **Q.** Do you have some kind of policy where you're not supposed
13 to have donors taking you out to dinner, taking you to Red
14 Sox games?

15 **A.** That's --

16 **Q.** Is that right?

17 **A.** That's correct.

18 **Q.** So is admitting the children and relatives of large
19 donors important to you and others at Harvard?

20 **A.** It is important for the long-term strength of the
21 institution that we have the resources would we need to,
22 among other things, provide scholarships but also for all the
23 other purposes at the university.

24 **Q.** Now, Dean Fitzsimmons, I'd like to walk through a few
25 exhibits with you.

1 MR. HUGHES: Your Honor, some of these Harvard has
2 indicated -- P104, P106, and P111.

3 And these are all in the binder there, Mr. Lee, but
4 I believe they are exhibits that you've taken the position
5 should not be shown to the gallery. We don't share that
6 position. If you still maintain that, then I think we need
7 to take it up.

8 MR. LEE: Yes, Your Honor. Here would be my
9 suggestion, if Mr. Hughes is willing. For each of these
10 where there's been some redaction, there's still enough
11 information in there if someone basically wanted to identify
12 who the person was, they could. We can put the exhibit up.
13 We're not going to object to the admission of the exhibits.
14 We could put the exhibit on the screen for Your Honor,
15 witness, counsel, and he can be examined on it but without
16 eliciting for the public record the information that would
17 personally identify an applicant.

18 MR. HUGHES: Your Honor, SFFA's position is that I
19 don't think there is personal identifying information in
20 these exhibits, and I don't believe that these should be kept
21 out of the public record. They don't meet the high bar for
22 keeping evidence out of the public record.

23 We can, I suppose, however you'd like to handle it.
24 We can take them up one by one maybe at another sidebar. But
25 our position is these should be part of the public record.

1 MR. LEE: Your Honor, just by way of example, if
2 Your Honor considered P104.

3 THE COURT: I have P104 in front of me. We have
4 the ELMO here, so we're not restricted to the way you all --
5 maybe you can redact on the screen. But we also have the
6 ELMO. I'm wondering with 104 if we redact -- it says
7 "committed to a building." If we redacted what came after
8 that in that sentence, if that sufficiently anonymizes it.

9 MR. LEE: On that one, that would be fine, Your
10 Honor. That's what would personally identify people.

11 MR. HUGHES: I think I can do that on my trial
12 presentation software, but I guess we'd need to turn off the
13 gallery screen to give me 30 seconds to do that.

14 THE COURT: That, we can easily do. So you can fix
15 it on your screen. You can also just black it out and use it
16 on the ELMO instead, whichever is easier for you.

17 MR. HUGHES: I'm a little better at this than the
18 ELMO.

19 THE COURT: Are you telling me my technology is
20 dated?

21 MR. HUGHES: My first time in court with the ELMO
22 did not go well. Is it off the gallery's screen?

23 THE COURT: It's off everybody's screen including
24 mine.

25 Karen, is it off the gallery screen?

1 THE CLERK: I shut it off.

2 MR. HUGHES: It's off from the gallery.

3 Mr. Lee, can you see what I've done?

4 MR. LEE: I will be able to in ten seconds.

5 MR. HUGHES: Your Honor, can you see?

6 MR. LEE: That would be fine, Your Honor.

7 THE COURT: Okay.

8 MR. HUGHES: I'll go ahead and offer P104 into
9 evidence.

10 MR. LEE: No objection.

11 THE COURT: It's admitted.

12 (Plaintiff Exhibit No. 104 admitted.)

13 THE COURT: On the screen for everybody.

14 BY MR. HUGHES:

15 Q. Now we can get started, Dean Fitzsimmons.

16 Who is David Ellwood?

17 A. David Ellwood was the dean of the Kennedy School.

18 Q. And he is writing you an email here in June of 2013,
19 correct?

20 A. That's correct.

21 Q. And the title of the email is "My Hero," correct?

22 A. It is.

23 Q. He said, "Once again you have done wonders. I am simply
24 thrilled about all the folks you were able to admit."

25 Then there are some redacted names.

1 He says, "Those are big wins, all big wins, and" --
2 a redacted name -- "has already committed to a building, and
3 building" -- and then we've got another redaction -- "and
4 other names have committed major money for fellowships before
5 the decision from you and all are likely to be prominent in
6 the future. Most importantly, I think all of these people
7 will be superb additions to the class."

8 Do you see that?

9 **A.** I do.

10 **Q.** He's expressing his gratitude for children of significant
11 donors to Harvard getting admitted to Harvard, correct?

12 **A.** That's correct.

13 **Q.** Now I'd like to turn to P106, and I'll give Harvard a
14 moment.

15 MR. LEE: Your Honor, if I could, I'll just give
16 Mr. Hughes a suggestion about what should be redacted.

17 THE COURT: Yes. I was just about to do the same,
18 but I would appreciate it if you would.

19 MR. HUGHES: I can agree to everything that Mr. Lee
20 is suggesting except for he wants me to redact, and I won't
21 say it out loud, the number -- the dollar number.

22 MR. LEE: That's fine. No problem.

23 MR. HUGHES: So now we'll need to go off that.
24 While I am doing this, I'll offer P106 into evidence.

25 Mr. Lee, can we confer momentarily?

1 MR. LEE: Is that all right with Your Honor, if we
2 confer?

3 MR. HUGHES: If we confer about a redaction?

4 THE COURT: Yes, of course.

5 MR. HUGHES: I'd like to leave in that word, get
6 rid of that word, put in that word.

7 MR. LEE: That's fine.

8 MR. HUGHES: Mr. Lee and Your Honor, I've got it
9 redacted. I don't know if you want to check it.

10 THE COURT: Have Mr. Lee or whoever from that table
11 take a look at it.

12 MR. LEE: Yes, that's right.

13 MR. HUGHES: Thank you, Mr. Lee. I think I've
14 already offered this, but I'm not sure it's been technically
15 admitted, Your Honor. I offer P106.

16 MR. LEE: No objection.

17 THE COURT: I'm not sure it's been offered, but now
18 it has and there's no objection. It's admitted.

19 (Plaintiff Exhibit No. 106 admitted.)

20 BY MR. HUGHES:

21 **Q.** Dean Fitzsimmons, can you see on the screen P106?

22 **A.** I can.

23 **Q.** You see down below there's an email from -- it looks like
24 it's from -- it's to Roger Cheever from Alessandra Bouchard.

25 Do you see that?

1 **A.** Yes.

2 **Q.** Who are those people?

3 **A.** Roger Cheever works in the development office, a
4 development officer, and Alessandra used to be his assistant.

5 **Q.** What she's telling Roger, "One of the early non-lineage
6 cases we've been trying, the Virginia, is that of" -- and
7 then we've got a redacted name -- "is the grandson of who is
8 married to" -- redacted -- "to the late" -- redacted -- "gave
9 about \$8.7 million to Harvard in his lifetime. Dean
10 Fitzsimmons would like to receive your insight when you're
11 able to provide it of the relative standing of this case."

12 And then you get an email from Mr. Cheever on
13 November 15, 2013, there at the top, correct?

14 **A.** Yes.

15 **Q.** Okay. And what Mr. Cheever tells you, he says, "Fitz" --
16 and there's a redacted name -- "was a devoted chair and a
17 generous donor. His latter years were quite challenging
18 based on having" -- redacted. Going forward, I don't see a
19 significant opportunity for further major gifts. Had an art
20 collection which conceivably could come our way, more
21 probably will it will go to the," redacted, "museum. I will
22 get Brad Voigt's perspective. For the moment, I would call
23 it a 2. I'll know more tomorrow. Roger."

24 That's what Mr. Cheever said to you in that email,
25 correct?

1 **A.** That's correct.

2 **Q.** And when Mr. Cheever says "I would call it a 2," a 2 is a
3 number that would go on the dean's interest list, right?

4 **A.** That's correct.

5 **Q.** And what would that number reflect?

6 **A.** It would be a reasonably serious donor.

7 **Q.** So you keep track on the dean's interest list of whether
8 somebody is a reasonably serious donor, right?

9 **A.** Yes. And also again whether this person was an important
10 part of the Harvard community during his or her lifetime.

11 **Q.** And it's the same kind of scoring system, at least
12 conceptually, as the 1 is a better score than a 2 is a better
13 score than a 3 and so forth, right?

14 **A.** That's correct.

15 THE COURT: Did I miss this? Who is Mr. Cheever?

16 BY MR. HUGHES:

17 **Q.** Dean Fitzsimmons?

18 **A.** He's a development officer at Harvard.

19 MR. HUGHES: I think we're now ready to move to
20 Plaintiff's Exhibit 111.

21 THE COURT: These redaction problems get more
22 complicated as we go through the exhibits.

23 MR. LEE: Yes.

24 MR. HUGHES: This is all I have in my examination
25 for redactions.

1 May I confer with Mr. Lee, Your Honor?

2 THE COURT: Of course.

3 MR. HUGHES: Your Honor, I'm going to need to
4 redact. Again, is the gallery screen off?

5 THE CLERK: Yes.

6 MR. HUGHES: If I may confer with Mr. Lee one more
7 time, Your Honor?

8 THE COURT: You may.

9 MR. HUGHES: Your Honor, I'd like to offer P111
10 into evidence.

11 MR. LEE: No objection, Your Honor.

12 THE COURT: Admitted.

13 (Plaintiff Exhibit No. 111 admitted.)

14 BY MR. HUGHES:

15 **Q.** I've got the redacted version that we worked out with
16 Harvard on the screen.

17 Dean Fitzsimmons, this is pretty small. Would you
18 prefer a hard copy to follow along?

19 **A.** I've got a hard copy here.

20 **Q.** Who is David Fish. This is an email from David Fish to
21 you on October 2, 2014.

22 **A.** He is our former tennis coach.

23 **Q.** He is writing you, and he says, "Hi, Bill. Thanks so
24 much for meeting with" -- redacted -- "during his visit. He
25 was unsurprisingly thrilled with the chance to meet you and

1 really enjoyed it despite the usual nerves. I know that you
2 are aware that Joe Donovan and Mike Smith have been in close
3 contact with the family for some time" -- redacted -- "who
4 donated" -- and then there's a redaction -- "to Harvard and
5 two full professorships and who over the last four years have
6 given us about \$1,100,000."

7 And then there's some more redactions, and I want
8 to go down to the next paragraph.

9 "It would mean a great deal to" -- redacted -- "and
10 to" -- redacted -- "to see" -- redacted -- "at Harvard. Thus
11 we rolled out the red carpet and we're all delighted that he
12 had a great time."

13 Do you see all that?

14 **A.** I do.

15 **Q.** And your response to him at the top is, "Dear Dave,
16 thanks for your email. I had a terrific meeting with" --
17 redacted -- "It would be perfectly appropriate for him to be
18 considered for a likely on October 21."

19 Do you see that?

20 **A.** I do.

21 **Q.** So this is the son or daughter or a relative of
22 significant donors to Harvard, correct?

23 **A.** That's correct.

24 **Q.** And you're telling the tennis coach that he can expect a
25 likely letter in October, correct?

1 **A.** I'm simply saying that he could be considered by the
2 committee in October for the possibility of a likely letter.
3 I could also have said to him that it would not be a good
4 idea and he wasn't a good candidate, for example.

5 **Q.** What is a likely letter?

6 **A.** A likely letter is given when we have an applicant who is
7 being pressured by another institution to commit to that
8 institution, either through a likely letter at that
9 institution or possibly by having the student apply binding
10 early decision to that institution.

11 **Q.** Let's change topics now.

12 MR. HUGHES: Your Honor, I want to make sure that I
13 offered P111.

14 THE COURT: You did, and it's been admitted.

15 BY MR. HUGHES:

16 **Q.** I want to shift topics now, Dean Fitzsimmons. I want to
17 focus on a series of events that started towards the end of
18 2012.

19 You're familiar with an article published by Ron
20 Unz in The American Conservative in December of 2012,
21 correct?

22 **A.** I am.

23 **Q.** And among other things, he advanced an argument that
24 Harvard was discriminating against Asian-American applicants,
25 correct?

1 **A.** Correct.

2 **Q.** And the Unz article caught the attention of David Brooks
3 at the New York Times. In fact, Mr. Brooks wrote an article
4 published on Christmas Eve of 2012 recognizing the Unz
5 article as one of the best magazine essays of the year,
6 correct?

7 **A.** That's correct.

8 **Q.** And the article caught the attention of you and others at
9 Harvard, correct?

10 **A.** That's correct.

11 **Q.** Both the Unz article and the magnified publicity it
12 received after Mr. Brooks' article was published on Christmas
13 Eve in the New York Times, correct?

14 **A.** That's correct.

15 **Q.** And the article also caught the attention of some Harvard
16 donors, correct?

17 **A.** That's correct.

18 **Q.** I'd like to show you Plaintiff's Exhibit 227.

19 MR. HUGHES: Before we get started, I'd like to
20 offer it into evidence.

21 MR. LEE: No objection. I'm sorry.

22 THE COURT: Admitted.

23 (Plaintiff Exhibit No. 227 admitted.)

24 BY MR. HUGHES:

25 **Q.** Dean Fitzsimmons, this -- let me back up. Here we go.

1 Start at the bottom. You're getting an email --
2 first of all, who is Olesia. With can you pronounce that
3 last name for me? I'm afraid I'll get it wrong.

4 **A.** Olesia Pacholok, my staff assistant.

5 **Q.** And sometimes emails that are intended for you come
6 through her first, correct?

7 **A.** Yes. She and I have the same email.

8 **Q.** You get an email and the subject of it is Ron Unz,
9 correct?

10 **A.** That's correct.

11 **Q.** And the date of the email is December 27, 2012, correct?

12 **A.** That's correct.

13 **Q.** It says, "Bill. See letter to editor in New York Times."

14 Do you see that?

15 **A.** I do.

16 **Q.** And then you respond. You say, "Dear" -- and we've got
17 the names redacted. "It was great to talk with you
18 yesterday. We clearly share many of the same perspectives on
19 Harvard and its history. Thanks for the follow up on the
20 letters. They will be helpful as we go through the process
21 of creating an institutional response. I made some progress
22 on that front last night and today. Given the sensitivity of
23 the issues, it will probably take some time to complete the
24 deliberations, and I will keep you posted. Have a wonderful
25 holiday."

1 Do you see that?

2 **A.** I do.

3 **Q.** And what you're talking about there is preparation of an
4 institutional response within Harvard to the Unz article and
5 the accusations against Harvard contained in that article,
6 correct?

7 **A.** That's correct.

8 **Q.** You mentioned that the article caught your attention. It
9 also caught the attention of the top leadership at Harvard,
10 correct?

11 **A.** That's correct.

12 **Q.** And do you recall receiving numerous emails over the
13 holidays concerning the Unz article?

14 **A.** Yes. I don't remember how many, but I get lots of emails
15 on lots of subjects.

16 **Q.** I'd actually like to walk you through a number of emails
17 that you received and just create a timeline of when you
18 received them and who was on the email.

19 MR. HUGHES: I think the easiest way to do that is
20 if I could use the privilege log that Harvard has provided to
21 refresh his memory on when he received certain emails, which
22 I think Your Honor ruled that we could do at the pretrial
23 conference. We don't need necessarily to offer it into
24 evidence, but I think it would be useful to use with the
25 witness in that manner.

1 THE COURT: You can use anything you want to
2 refresh recollection.

3 MR. HUGHES: Thank you, Your Honor. May I approach
4 the witness?

5 THE COURT: Yes.

6 BY MR. HUGHES:

7 Q. So, Dean Fitzsimmons, I've got the privilege log in front
8 of you, which is a document your lawyers provided us. I
9 don't want to talk about the substance of what's contained in
10 any of these emails because it's privileged, but I just want
11 to walk through a number of emails that you were receiving on
12 this topic.

13 If you look starting with on December 27, do you
14 see I've got your name highlighted there?

15 A. Yes.

16 Q. So you received a couple of emails on December 27 from
17 Robert Iuliano, correct?

18 A. It appears that I did.

19 Q. And the subject was the Unz article, correct?

20 A. Yes.

21 Q. And who is Robert Iuliano?

22 A. He is the general counsel of Harvard and is here today.

23 Q. And if you go down, you actually received four emails it
24 looks like from him on the 27th, correct?

25 A. Just adding them up. It appears to be the case, yes.

1 Q. All of those relate to The American Conservative article
2 or the Unz article, correct? That's in the subject line.

3 A. I'm not sure about Number 10, but I certainly -- yes.

4 Q. And then you received on the 27th three more emails from
5 President Faust, correct?

6 A. Yes.

7 Q. And again, those relate to the subject line, American
8 Conservative article, correct?

9 A. That's correct.

10 Q. And then, in fact, if you go to the next page there are
11 three more emails from Mr. Iuliano to you, again on the 27th,
12 concerning The American Conservative article, correct?

13 A. Yes.

14 Q. And then a couple more from President Faust to you on
15 that same day, correct?

16 A. Yes.

17 Q. And then we get to the first time you send an email on
18 this list, and that is on the 28th of December, correct?

19 A. That's correct.

20 Q. And you send an email to Erin Driver-Linn on the 28th of
21 December, subject, Forward American Conservative article,
22 correct?

23 A. That's correct.

24 Q. And if we switch to the next page, you send two
25 additional emails on the 28th to Ms. Driver-Linn with the

1 same subject heading, correct?

2 **A.** That would be correct.

3 **Q.** And then she responds with emails back to you. It looks
4 like there are four in a row on the 29th, emailing back to
5 you and others, correct?

6 **A.** That's correct.

7 **Q.** If you look at line 26, the first email that -- first of
8 all, who is Ms. Driver-Linn?

9 **A.** She was the head of the office of institutional research.
10 She now works at the School of Public Health at Harvard in
11 the same sort of role.

12 **Q.** So at this time when she's sending these emails, she's
13 the head of OIR, correct?

14 **A.** That's correct.

15 **Q.** On her first email, she copies Alan Garber. Do you see
16 that?

17 **A.** I do.

18 **Q.** Who is Alan Garber?

19 **A.** He's the provost of Harvard.

20 **Q.** Who role does the provost have at Harvard?

21 **A.** It's really sort of an administrative oversight of the
22 university, has a portfolio for all the different parts of
23 the university.

24 **Q.** One of the top officials in the entire university,
25 correct?

1 **A.** That's correct.

2 **Q.** And then her next email includes someone named Erica
3 Bever, among others, correct?

4 **A.** Yes.

5 **Q.** Who is Erica Bever?

6 **A.** She then, if I am looking at the date, worked with -- in
7 the office of institutional research. She now works in our
8 office.

9 **Q.** So these are all emails that we've been talking about, 1,
10 2, 3, 4 coming from Driver-Linn to you and others on the 29th
11 of December 2012, correct?

12 **A.** Yes.

13 **Q.** And then there's one email from Mr. Garber, Provost
14 Garber, to Ms. Driver-Linn to you after the ones we've just
15 discussed, also on the 29th of December, correct?

16 **A.** Yes.

17 **Q.** And then there are two more emails to Provost Garber and
18 you later on that day, on the 29th of December, again with
19 the title "American Conservative article," correct?

20 **A.** That's correct.

21 **Q.** And then there's yet another email from Provost Garber,
22 later on at 6:39 p.m. on the 29th of December, to
23 Ms. Driver-Linn, copying you again concerning The American
24 Conservative article, correct?

25 **A.** I'm sorry. Which document number is that?

1 **Q.** We're looking at Number 29.

2 **A.** 29.

3 **Q.** At the very bottom of page 3. Do you see your name
4 highlighted there?

5 **A.** It's not in the same order. I'm trying to find it.

6 **Q.** If you look at page 3, there's a --

7 **A.** Page 3. Okay.

8 **Q.** On the very bottom.

9 **A.** Okay. Yes.

10 **Q.** Do you see that? There's an email from Provost Garber to
11 Ms. Driver-Linn and to you, correct?

12 **A.** That's correct.

13 **Q.** And then yet another email from the provost to
14 Ms. Driver-Linn and you on the 29th, at the top of the next
15 page, correct?

16 **A.** Yes.

17 **Q.** All right. Now, I want to fast-forward to after the new
18 year. If you turn to page 5 of the document that you've got
19 in front of you, starting kind of in the middle you can see
20 there's an email on the 2nd of January from Ms. Driver-Linn
21 at OIR to you and to the provost, again concerning The
22 American Conservative article?

23 **A.** That's correct.

24 **Q.** What I've done is I've counted up -- and you can look and
25 see. If you start with Number 31, that's what we just talked

1 about, that's correspondence between you and Ms. Driver-Linn
2 on the 2nd of January. You go down, you get to the second
3 piece of correspondence, again an email from Ms. Driver-Linn
4 to you also on the 2nd of January. You drop down to what is
5 Document Number 91, there's an email from you to
6 Ms. Driver-Linn on the 3rd of January. That's three
7 different pieces of correspondence, correct?

8 **A.** Yes.

9 **Q.** And then there are two emails from Provost Garber to you
10 and Ms. Driver-Linn. And in fairness, those may be the same
11 thing; they've got the time stamp. But at least that's
12 additional communication between the provost, you, and
13 Ms. Driver-Linn concerning The American Conservative article,
14 correct?

15 **A.** That's correct.

16 **Q.** And then we've got the bottom of page 4, two more emails
17 from Ms. Driver-Linn to you and Provost Garber, and also on
18 the 3rd of January at 1:56.

19 **A.** I think you mean page 5, but I see them.

20 **Q.** Two at the bottom there from Ms. Driver-Linn to you and
21 Provost Garber on the 3rd of January, correct?

22 **A.** That's correct.

23 **Q.** And then if we switch over -- we're almost finished with
24 this -- to page 6, you see there are several emails.

25 Starting with Number 33, there's three in a row there from

1 Elizabeth Yong to you and Ms. Driver-Linn, among others,
2 concerning demographic data, correct?

3 **A.** That's correct.

4 **Q.** Ms. Yong works in your office, correct?

5 **A.** She was our institutional researcher for our office.

6 **Q.** She doesn't work there still, but at that time she was
7 the institutional researcher, correct?

8 **A.** That's correct.

9 **Q.** And then down at the bottom of page 6 we've got another
10 from Ms. Yong to Ms. Driver-Linn -- or Dr. Driver-Linn,
11 excuse me, and you, Dean Fitzsimmons, again on the 3rd
12 of January, correct?

13 **A.** Yes.

14 **Q.** And two more emails from Dr. Driver-Linn, one to Ms. Yong
15 and to you and one to Mr. Iuliano and you, correct?

16 **A.** That's correct.

17 **Q.** All of this, these exchanges are happening kind of right
18 at the end of 2012 and right at the beginning of 2013, top
19 leadership at Harvard exchanging emails concerning The
20 American Conservative article, correct?

21 **A.** That's correct.

22 **Q.** I'd like to now show you Plaintiff's Exhibit 230.

23 MR. HUGHES: And I'd like to offer it into
24 evidence.

25 MR. LEE: No objection, Your Honor.

1 THE COURT: Admitted.

2 MR. HUGHES: Thank you, Your Honor.

3 (Plaintiff Exhibit No. 230 admitted.)

4 BY MR. HUGHES:

5 Q. And at the top, Dean Fitzsimmons, you can see this is an
6 email chain from Kaitlin Howrigan.

7 Do you see that?

8 A. I do.

9 Q. Who is she?

10 A. She worked in our office at the time and helped with the
11 collection of data and research.

12 Q. And the date of the email is January 8, 2013, correct?

13 A. That's correct.

14 Q. And you're copied on the email?

15 A. Yes.

16 Q. If we go to the bottom, you can see the part that I've
17 got highlighted.

18 Ms. Yong says, "Hi, Kaitlin. We need access to the
19 RO data files for the last few years. Is it all right with
20 you if I ask Eric to move that data into the ArchiveTwo
21 share. We're in the middle of a study of Asian-Americans at
22 Harvard. And rather than having to rerun all of the RO data,
23 it will be much faster just to use the ones you've already
24 created. Also there's a meetings at Mass Hall tomorrow at
25 2:00 p.m. that I would like to at least have some preliminary

1 data for."

2 Do you see that?

3 **A.** I do.

4 **Q.** Do you agree that at this time, January 8, 2013, your
5 office was in the middle of a study of Asian-Americans at
6 Harvard?

7 **A.** Yes.

8 **Q.** And did you attend the meeting at Mass Hall that
9 occurred, it looks like, on January 9, 2013, at 2:00 p.m.?

10 **A.** I don't remember exactly.

11 **Q.** Is Mass Hall where the president and provost offices are?

12 **A.** Yes.

13 **Q.** Now I'd like to show you Plaintiff's Exhibit 236.

14 MR. HUGHES: I'd like to offer it into evidence,
15 Your Honor.

16 MR. LEE: No objection.

17 MR. HUGHES: Thank you, Mr. Lee.

18 THE COURT: Admitted.

19 (Plaintiff Exhibit No. 236 admitted.)

20 MR. HUGHES: Thank you, Your Honor.

21 BY MR. HUGHES:

22 **Q.** Dean Fitzsimmons, I've got Plaintiff's Exhibit 236 on the
23 screen. This is another email from an alumni concerned with
24 Harvard's response to the Unz article. So let me just read
25 the email.

1 On January 20, 2013, the alumni writes, "Dear Bill.
2 Have I missed a printed response from Harvard to the errors
3 and negative spin of these articles? If not, what other
4 steps did Harvard take to correct the errors and seek
5 retractions? E.g., was the public editor of the New York
6 Times ever advised? Were the authors? Uncorrected, the
7 impression is damaging to Harvard."

8 Do you see that?

9 **A.** I do.

10 **Q.** And the title of the email, the subject line that you can
11 see above is "Ron Unz and the David Brooks articles,"
12 correct?

13 **A.** That's correct.

14 **Q.** You write back do this donor, "Dear" redacted. "There
15 have been a number of meetings already to consider how
16 Harvard should respond. Both the researchers and the public
17 affairs staff are hard at work doing a variety of analysis.
18 Our office has been involved in the deliberations, and we
19 have provided data that will help to frame the decision.
20 Obviously we stand ready to help in any way we can. Bill."

21 Do you see that?

22 **A.** I do.

23 **Q.** Was the information that you communicated in this email
24 on January 20, 2013, accurate?

25 **A.** It appears accurate.

1 **Q.** Okay. So at this time you knew Harvard had already
2 deployed its researchers to look into the issues raised in
3 the Unz article, correct?

4 **A.** Yes.

5 **Q.** And those researchers would have been researchers at the
6 Harvard office of institutional research, correct?

7 **A.** That's correct.

8 **Q.** And your office was cooperating at this time, January 20,
9 2013, into the Harvard office of institutional research
10 analysis of the issues raised around the Unz article,
11 correct?

12 **A.** That's correct.

13 **Q.** And again, the issue raised by the Unz article was
14 potential discrimination by Harvard against Asian-Americans,
15 correct?

16 **A.** Yes, among other things.

17 **Q.** So now I'd like to show you Plaintiff's Exhibit 14 and
18 offer it into evidence.

19 MR. LEE: No objection, Your Honor.

20 THE COURT: Admitted.

21 (Plaintiff Exhibit No. 14 admitted.)

22 MR. HUGHES: Thank you, Your Honor.

23 THE WITNESS: I'm sorry. Is this P14?

24 BY MR. HUGHES:

25 **Q.** Yes, Dean Fitzsimmons, Plaintiff's Exhibit 14, P14.

1 **A.** Thank you.

2 **Q.** We're actually going to start on the second page. I'll
3 blow it up to try to help us on the screen. Can you see
4 that?

5 **A.** Yes, I can.

6 **Q.** So we just looked at an email exchange from January 20
7 with the donor. Now we've moved ahead to February 18, 2013,
8 when you're getting an email from Dr. Driver-Linn on that
9 date, correct?

10 **A.** That's correct.

11 **Q.** She says, "Dear Fitz and Sally." Who is Sally?

12 **A.** Sally Donahue was our director of financial aid at the
13 time. She now works part-time for us.

14 **Q.** She starts -- Dr. Driver-Linn starts, "Dear Fitz and
15 Sally. Hope all is going well. I know this is a super busy
16 time of year for you, so advance apologies for the demands on
17 your time. Just let me know if these are impossible because
18 we can probably come up with alternatives to meetings."

19 And then her first thing that she discusses in the
20 email is something called COFHE. Do you see that?

21 **A.** I do.

22 **Q.** What does that stand for?

23 **A.** That's the consortium on financing higher education.

24 **Q.** I am interested in the second thing. So Dr. Driver-Linn
25 says, "Second, the team has continued to work on a variety of

1 admissions and financial aid analyses, including follow-up on
2 some of those regressions and tracking down the discrepancy
3 in IPEDS numbers that came up around the Unz discussions."

4 Do you see that?

5 **A.** I do.

6 **Q.** And what Dr. Driver-Linn is talking about is she and her
7 colleagues at OIR, one of the things they've been working on
8 are regressions related to the concerns that have come up
9 around the Unz article, correct?

10 **A.** That's correct.

11 **Q.** And then at the bottom she's asking for a time for a
12 meeting. "Just let me know what works for you. Look forward
13 to seeing you sometime soon."

14 Do you see that?

15 **A.** I do.

16 **Q.** And then to fast-forward this, if you look at the top of
17 Plaintiff's Exhibit 14, you write Dr. Driver-Linn. You say,
18 "Sally and I can make the 3:30 meeting on Monday at your
19 place."

20 Do you see that?

21 **A.** I do.

22 **Q.** She says, "Thanks, Fitz."

23 And you understand that that was a meeting that
24 occurred on February 25, 2013, correct?

25 **A.** I think that's right.

1 **Q.** Just to make sure we're all on the same page, the meeting
2 is proposed for February 25, and you say that you can make
3 it, correct?

4 **A.** Yes. I see.

5 MR. HUGHES: Your Honor, may I approach the
6 witness? I'd like to hand him a paper copy of Plaintiff's
7 Exhibit 602.

8 THE COURT: Yes.

9 BY MR. HUGHES:

10 **Q.** Dean Fitzsimmons, do you have the paper copy of
11 Plaintiff's Exhibit 602 in front of you?

12 **A.** I do.

13 **Q.** And do you see that there's a sticker in the middle of it
14 that has the number 17 and below it your name, on the very
15 first page, correct?

16 **A.** It is correct.

17 **Q.** So what that is, this was Exhibit 17 to your deposition,
18 correct?

19 **A.** I think that's true.

20 **Q.** Okay.

21 **A.** I'm not a lawyer.

22 **Q.** And you carefully and slowly looked through this document
23 at length at your deposition and testified that you had a
24 recollection of this document, correct?

25 MR. LEE: Your Honor, I object for two reasons.

1 The first thing is --

2 THE COURT: Sustained.

3 MR. HUGHES: Your Honor, may we approach?

4 THE COURT: Yes. He hasn't -- you can approach,
5 but he hasn't denied any familiarity with the document.

6 MR. HUGHES: Okay. Try it again.

7 BY MR. HUGHES:

8 **Q.** Dean Fitzsimmons, are you familiar with this document?

9 **A.** I've seen it before or some of the document. I'm not
10 quite sure, you know, exactly what you're asking, I guess.

11 **Q.** Do you recall carefully paging through the document at
12 your deposition for six minutes and telling us that you
13 recognize this document?

14 **A.** Yes. As it turns out, it's clear that I remember some of
15 the parts of the document. But there are clearly problems
16 with the document.

17 MR. LEE: Your Honor, that's precisely the reason I
18 objected. The deposition states, "You remember seeing this
19 document?"

20 "ANSWER: Some of the information is familiar."

21 That's perfectly consistent with what he said.

22 THE COURT: He's not impeaching him at the moment.

23 MR. HUGHES: Your Honor, if I may, he was asked --
24 he was handed the document. He looked at it for six minutes,
25 page by page by page. Then he was asked, "Do you recognize

1 this document?"

2 And he testified, "I have a recollection of it."

3 THE COURT: The question was, do you recall
4 carefully paging through the document at your deposition for
5 six minutes and telling us that you recognize this document?

6 So let's go back and answer that question.

7 THE WITNESS: Yes. I mean I don't remember paging
8 through it for six minutes. I looked at the document. It
9 was clear that I had seen some of the stuff in the document
10 before.

11 MR. HUGHES: Your Honor, I'd like to play the video
12 of exactly what happened at the deposition because his
13 familiarity with this document is something that was called
14 into question by Mr. Lee in opening. And I understand
15 that -- I think that viewing that video and watching a
16 witness page through and then be asked whether he has a
17 recollection of this document and having him say "I have a
18 recollection of it" is an impeachment of the testimony that
19 we just heard.

20 THE COURT: You're going to have to be more
21 specific with me about where you think the impeachment was.
22 Give me a second here.

23 MR. LEE: Your Honor, I have extra copies of the
24 deposition right at this particular point.

25 THE COURT: Tell me where you think the impeachment

1 on what he just --

2 MR. HUGHES: Hold on. You just said the question
3 was, do you recall carefully paging through the document at
4 your deposition for six minutes and telling us that you
5 recognize this document?

6 So -- this is you, Your Honor -- so let's go back
7 and answer that question.

8 "ANSWER: Yes. I mean, I don't remember paging
9 through it for six minutes. I looked at the document. It
10 was clear that I had seen some of the stuff in the document
11 before."

12 And I think the impeachment is he says he doesn't
13 remember. I guess we can refresh his recollection by
14 watching the video.

15 THE COURT: Are you disputing that he reviewed it
16 for six minutes?

17 MR. LEE: No.

18 If I could give Your Honor, here's the deposition.

19 THE COURT: At the moment, the only thing he said
20 is he's not sure that he looked at it for six minutes, right?

21 MR. HUGHES: I just want to make sure that it's
22 clear for the record and the witness agrees that he paged
23 through the document for six minutes at his deposition and
24 then he was asked, "Do you recognize this document?"

25 And he answered, page 391, "I have a recollection

1 of it."

2 MR. LEE: That's exactly why there's no
3 impeachment. We don't dispute that he looked at it for six
4 minutes. We don't say that -- and then the precise question
5 that was asked, the portion that I gave you --

6 THE COURT: You say, "Do you recognize this
7 document?"

8 He says, "I have a recollection of it."

9 I'm on 392 at line 7.

10 MR. LEE: Right.

11 THE COURT: Hold on a second.

12 MR. HUGHES: That's exactly the exchange.

13 MR. LEE: And then, Your Honor, if we go over to
14 393.

15 THE COURT: Hold on.

16 MR. LEE: Remember, Your Honor, with some of these
17 witnesses, in preparation for the deposition, the real
18 question is what happened to --

19 THE COURT: Let me just read through it.

20 MR. LEE: The question is --

21 THE COURT: Hold on. Let me read it.

22 MR. LEE: Okay.

23 MR. HUGHES: The impeachment/refreshing
24 recollection is that he just -- his testimony was that he
25 doesn't remember looking at it for six minutes.

1 When the witness flips through the whole thing,
2 looks at the pages page by page, and gives the testimony on
3 392, line 6, "Do you recognize this document?" and gives an
4 unqualified "I have a recollection of it," I think that is
5 important. And what he's disagreed with is how carefully he
6 reviewed it before he gave that testimony.

7 THE COURT: They're willing to stipulate that he
8 looked at it for six minutes. I will accept for the record
9 that he looked at it for six minutes.

10 The questions that follow about how familiar he is
11 with it, he's pretty clear that he is familiar with parts of
12 it, and he remembers things about it. So that's not
13 inconsistent. He says he remembers parts of it.

14 You ask him questions about what you want to ask
15 him. If it's a part that he remembers, he'll testify about
16 it. If you need to refresh his recollection on something in
17 here that he used to have a recollection of that part but no
18 longer does, you can do that.

19 But let's get into the document and see what he
20 remembers and what he doesn't. I will accept for the record
21 that he looked at it for six minutes.

22 MR. HUGHES: Thank you, Your Honor. What I'd like
23 to do is I'd like to offer P602 into evidence.

24 MR. LEE: I object. There's no foundation. There
25 will be another witness who actually prepared the document

1 who will be here to testify. But there's no foundation for
2 this witness.

3 THE COURT: I can hold off on the admitting of the
4 exhibit, but I'm going to let him ask him questions about it.

5 MR. LEE: I understand.

6 MR. HUGHES: Just so Your Honor is clear, he
7 testified in his deposition he had a recollection of it
8 independent of his deposition preparation. We'll get into
9 all of that. What I would prefer to do is actually show him
10 the color version of this, which is Plaintiff's Exhibit 9,
11 which I'd also like to offer into evidence, which I assume
12 Mr. Lee has the same objection to.

13 THE COURT: I assume this exhibit is going to come
14 in. I'm going to let you ask questions of him about it now
15 so that he doesn't have to be recalled once it's admitted.
16 My guess is Mr. Lee is also expecting the document to come
17 in.

18 MR. LEE: Yes. At some point, Your Honor. I think
19 having the color version is fine, and having him be examined
20 on the same basis Your Honor talked about, the non-color
21 version, is fine.

22 THE COURT: So now it's not going to be admitted at
23 the moment. I am going to let him be questioned about it.

24 What's your view on whether it's put up for the
25 studio audience here? It's a not-admitted exhibit.

1 MR. LEE: It's fine, Your Honor.

2 THE COURT: Okay. Karen, go ahead -- it's not
3 admitted at the moment, but we will put it up on the screen
4 so everybody can follow along.

5 MR. HUGHES: Thank you, Your Honor.

6 BY MR. HUGHES:

7 Q. Do you see, Dean Fitzsimmons -- I've got Plaintiff's
8 Exhibit 9 on the screen.

9 Do you see that?

10 A. I do.

11 Q. And this is the color version of what I just showed you,
12 which is Plaintiff's Exhibit 602, correct?

13 A. Do I have this --

14 Q. You have P9 in your binder. Yes, sir.

15 A. Okay. Yeah. Okay.

16 Q. This is the color version of the document that you
17 testified you have a recollection of, correct?

18 MR. LEE: I object.

19 THE COURT: He has some recollection of.

20 BY MR. HUGHES:

21 Q. Let's look at page 5. Do you see I've got a blowup of
22 page 5 of Plaintiff's Exhibit 9 in front of you, Dean
23 Fitzsimmons?

24 A. Yes, I do.

25 Q. You're familiar with the information that's on page 5 of

1 Plaintiff's Exhibit 9, correct?

2 **A.** I'm sorry. Page 5?

3 **Q.** Yes, sir. You're familiar with it. You can see on the
4 screen, I've got the information in front of you, this is
5 information, Mr. Lee, that you're familiar with, correct,
6 Dean Fitzsimmons?

7 MR. LEE: Your Honor, I think the question is
8 whether he saw this page before.

9 MR. HUGHES: Hold on, then. I'll ask that
10 question.

11 BY MR. HUGHES:

12 **Q.** Dean Fitzsimmons, is this part of the document that you
13 have a recollection of?

14 **A.** I'm not sure what you mean. I don't know whether it was
15 in this document or not.

16 **Q.** Why don't you get your deposition exhibit out and turn to
17 page 5 of Plaintiff's Exhibit 602. There's a loose copy
18 right in front of it you, Dean Fitzsimmons. Right in front
19 of you, right there.

20 **A.** Here?

21 **Q.** Yeah. Turn to page 5.

22 THE COURT: Mr. Hughes, can you just follow up with
23 him? I think he was about to say he's familiar with the
24 page, but he's not sure if it's from this document. That
25 might save you.

1 BY MR. HUGHES:

2 Q. Are you familiar with this page that I've got up on the
3 screen here with this kind of information in it?

4 A. Again, at the time I'm not sure I saw it in this
5 document.

6 Q. You don't know one way or the other. That's your
7 testimony?

8 A. I could have. I see lots of documents.

9 Q. This is something you could have seen?

10 A. Pardon?

11 Q. This is something that you could have seen in your role
12 as the dean of the Harvard admissions office, correct?

13 A. Quite possible.

14 Q. It was contained in a document that you've already told
15 us you reviewed for six minutes and you have a recollection
16 of the document.

17 A. I have a recollection of a document. I have a
18 recollection, though, that I'd seen some of it before.

19 Q. I'd like to ask you questions about the information
20 that's on page 5 of Plaintiff's Exhibit 9.

21 MR. LEE: I object. There's not enough foundation
22 for this. He actually was asked in his deposition whether he
23 had ever seen page 5 before, and he said, "I can't remember
24 seeing it five or six years ago."

25 THE COURT: I'm going to let him ask the questions

1 about the data that's contained in this exhibit on this page.

2 MR. HUGHES: Thank you, Your Honor.

3 BY MR. HUGHES:

4 Q. So first of all, Dean Fitzsimmons, you see that the data
5 that OIR has put together here excludes legacies and
6 athletes.

7 Do you see that?

8 A. I do.

9 Q. And then I want to look at the chart that OIR has
10 prepared for -- the title of it is "Difference in Average
11 Test Scores and Ratings For White and Asian Applicants."

12 Do you see that?

13 A. I do.

14 Q. Do you see there's kind of a centerline here? Do you see
15 that, the zero line?

16 A. I do.

17 Q. And if you go to the right of the zero line, that is
18 Asian higher, correct?

19 A. That's correct.

20 Q. And if you go to the left of the centerline, that is
21 white higher, correct?

22 A. That's correct.

23 Q. And the first two have to do with SAT II average and SAT
24 average, correct?

25 A. That's correct.

1 **Q.** And the bars on that are way out to the right. Asians
2 are higher in those two categories, correct?

3 THE COURT: What's the difference between SAT and
4 SAT II?

5 MR. HUGHES: I think Dean Fitzsimmons can probably
6 answer that for us.

7 THE WITNESS: The SAT II are now called the subject
8 test. They are tests in particular subjects, chemistry,
9 European history, and so on. So that would be the average of
10 whichever of the SAT II tests the students had taken.

11 BY MR. HUGHES:

12 **Q.** And then the SAT is just the traditional verbal math SAT,
13 correct?

14 **A.** That's correct.

15 **Q.** In both those categories, the Asian students are doing --
16 the Asian applicants are doing better than the white
17 applicants, correct?

18 **A.** That's correct.

19 **Q.** And then we have alumni rating and alumni rating 2. Is
20 alumni rating 2 the alumni personal rating? Is that the
21 second box?

22 **A.** I'm not sure how they lined that up, quite frankly. I
23 presume -- I'm not entirely sure, to be honest -- one would
24 probably be the overall rating. The other would be the
25 personal rating.

1 **Q.** And one of these alumni -- there's only two alumni
2 ratings, correct?

3 **A.** Yes, it would appear probably on our system. But we ask
4 them to rate candidates in other respects as well.

5 **Q.** Sure. And here in OIR's chart we've got Asian applicants
6 doing better than white applicants in alumni rating 2, and
7 it's pretty close, slightly better for white applicants in
8 alumni rating 1, correct?

9 **A.** That's correct.

10 **Q.** And we talked actually yesterday about teacher
11 recommendations and guidance counselors. Those are the next
12 three categories. We've got a slight favoring white
13 applicants in some and a slight favor of Asians in the other,
14 they're pretty darn close to each other in this table,
15 correct?

16 **A.** Well there, again, they are different obviously.

17 **Q.** But there's not a significant difference here between the
18 white and the Asian applicants?

19 **A.** I'm not sure what "significant" means. And again, I'm
20 not entirely sure about this data, but it's consistent with
21 what we have talked about.

22 **Q.** What you're seeing here is consistent with what you would
23 expect to see, given your experience as dean. That's what
24 you just told me, correct?

25 **A.** Certainly some of the things we discussed yesterday.

1 **Q.** Those are consistent with what you're seeing in this
2 chart, correct?

3 **A.** That's correct.

4 THE COURT: What's Teacher 1 and Teacher 2?

5 THE WITNESS: It would be the two teacher reports
6 that we require. So we ask as part of the application each
7 student to submit a guidance counselor school report with a
8 transcript, and so on. So that's what the guidance rating
9 is.

10 Then we ask for recommendations and information
11 from two teachers. And I think it's just the way --
12 Teacher 1, Teacher 2 would just simply be I think how the
13 material had been ordered in the application. But they're
14 just -- you could switch them. There's no significance in
15 being, in other words, Teacher Number 1.

16 BY MR. HUGHES:

17 **Q.** They don't get a prize?

18 **A.** No, no prize. And it's not our rating system.

19 THE COURT: Tell me again, Alumni 1 and Alumni 2.

20 THE WITNESS: I'm not sure. One of them would be
21 the personal rating. The other would be the overall rating.
22 But I'm not familiar enough with this data to know which
23 would be which.

24 BY MR. HUGHES:

25 **Q.** And, Dean Fitzsimmons, just to be clear, the alumni

1 ratings --

2 MR. HUGHES: I'm sorry, Your Honor. Had you
3 finished?

4 THE COURT: Yes. Sorry.

5 MR. HUGHES: I didn't mean to interrupt.

6 BY MR. HUGHES:

7 Q. The alumni ratings, those are ratings that are awarded by
8 the interviewers who actually meet the applicants, correct?

9 A. That's correct.

10 Q. And for the most part, the admissions officers in your
11 admissions office when they give the personal score, the
12 extracurricular score, they haven't met the applicant in
13 person. They're reading a paper file, correct?

14 A. Mostly. But remember we do interview a fair number of
15 people ourselves. And we also meet people on the road
16 because we're out at 150 locations across the country every
17 year. Occasionally I will meet some people I will put on my
18 dean's list, for example.

19 Q. Some of the applicants are known to you, but most of them
20 are being judged on a paper file?

21 A. Yes. With all the information that is in the
22 application.

23 Q. Then we get down to personal rating here, and here we see
24 that whites are doing better than Asians in the personal
25 rating, correct?

1 **A.** Yes. And again, this would be the staff person after
2 looking at all the information would make that rating.

3 **Q.** That's a staff person in your admissions office, correct?

4 **A.** Yes. Whoever had read -- there might have been more than
5 one person. Whoever read the application.

6 **Q.** This shows -- and then we go on and we see that Asians
7 are getting better extracurricular ratings, better academic
8 rating, and the only rating that your staff members are
9 providing where the whites are doing better than the Asian
10 applicants is in the personal rating, correct?

11 **A.** No. That isn't actually the way it works. Again, each
12 staff person goes through the application, as you know, in
13 great detail, looking at everything, trying to take all the
14 factors into account well beyond the numbers. And the staff
15 person would -- based on that evidence, would assign an
16 extracurricular rating and in the same way would do the same
17 thing for the academic rating.

18 So it's really, again, looking at all three of
19 those -- the personal, the extracurricular, and the
20 academic -- is all the results of a staff person reading
21 carefully everything in the application and then making a
22 judgment about what the rating should be based on the
23 evidence.

24 **Q.** Just so we're on the same page. On page 5 of P2, the
25 three ratings that are -- never mind. Strike that. I'm

1 going to move on. Let's go to the next page.

2 Dean Fitzsimmons, is the information contained on
3 page 6 of Plaintiff's Exhibit 2, is this information that
4 looks familiar to you from this document?

5 **A.** I am not sure I remember seeing it in the document.

6 **Q.** Let me ask you about some information and just see if you
7 can agree whether it makes sense in light of your experience
8 in the office of admissions.

9 MR. LEE: Your Honor, I am going to object, but I
10 understand Your Honor's prior ruling. But for a document he
11 doesn't recognize, at some point there's a limit.

12 THE COURT: I'm going to let you do your direct
13 examination the way you want to do it.

14 I'll tell you what I'm interested in from this
15 witness and this document is when he sees this sort of data,
16 what's his reaction to it. Does he have any explanation to
17 it. I don't think he's in a position to verify the data or
18 say that it's accurate. But when he sees a chart like this,
19 his response to it if he saw it. I think he did, but -- I'd
20 rather hear his view of the data and how data could be like
21 that than actually verify the actual data, which I don't
22 think he's in a position to do.

23 MR. HUGHES: I don't think I have asked him to
24 verify it.

25 THE COURT: It's your direct examination. It's a

1 bench trial. I'll disregard what I think is not
2 appropriately before me. But this is the kind of data that
3 in his position he would be familiar with, whether he's
4 actually familiar with this particular document or not.

5 So I'm interested in his reaction to the data,
6 including whether he thinks it's wrong. His answers are what
7 they're going to be. I think his response to this kind of
8 data is fair game.

9 MR. HUGHES: Thank you, Your Honor.

10 BY MR. HUGHES:

11 Q. So looking at page 6, Dean Fitzsimmons, we've got a table
12 or a chart called "Admit Rates by Academic Index For White
13 and Asian Applicants, Classes of 2007-2016."

14 Do you see that?

15 A. I do.

16 Q. And then along the bottom it says, "Standardized academic
17 index (zero equals average academic index)."

18 Do you see that?

19 A. I do.

20 Q. So what we have here is a chart that shows admit rates
21 for white applicants and admit rates for Asian applicants as
22 you move up the academic index, correct?

23 A. That's what it appears to be. I haven't studied the
24 document.

25 Q. So at least OIR uses academic index as a metric when it

1 is evaluating the admissions chances for white and Asian
2 applicants, correct?

3 **A.** Apparently they do. It's not something that we use in
4 our office.

5 **Q.** And what you can see here on the dotted line are the
6 admit rates for the applicants under consideration here. The
7 darker line is for the white admit rate. And I can't really
8 tell what color that is, but the lighter line is the Asian
9 admit rate, correct?

10 **A.** That is correct.

11 **Q.** And at every step of the way from the weakest spot on the
12 academic index to the strongest spot on the academic index,
13 white applicants are admitted at a higher rate than Asian
14 applicants, according to this chart, correct?

15 **A.** That's what it shows.

16 **Q.** Is that consistent with what you see in the dean's office
17 as the dean of admissions?

18 **A.** I'm sorry. Could you say that again?

19 **Q.** Is that consistent with what you see, that comparably
20 academically qualified white applicants are admitted at a
21 higher rate than Asian applicants?

22 **A.** It's certainly something we've always been concerned
23 about the admit rate, and it's certainly something that Susie
24 Chao and I covered really back in 1988, and it was certainly
25 an issue that was studied in depth by OCR in its 1990 report.

1 So it's always something we look at. Certainly
2 we've continued to do NLNA, that kind of thing again as a
3 check. So yeah, I'm familiar with it.

4 **Q.** NLNA really is a measure of kind of the overall admit
5 rate. Not the overall class admit rate, but if you take
6 everybody in the NLNA group, you're looking at what's the
7 admit rate for Asian-American applicants in the NLNA group,
8 what's the admit rate for white applicants, and so forth in
9 the NLNA group, correct?

10 **A.** Just a, yeah, quick overview, I guess is the best way to
11 look at it.

12 **Q.** It doesn't take and compare similarly academically
13 qualified candidates and compare admission rates of similarly
14 academically qualified candidates, correct?

15 **A.** Not with that particular piece.

16 **Q.** But the information that you see here isn't surprising
17 because you know, going back to OCR, that Harvard admits
18 similarly academically qualified white candidates at a higher
19 rate than Asian applicants, correct?

20 **A.** I'm not sure exactly which part of the report you're
21 referring to. But there was a difference in the admission
22 rate, which is something that they looked at very carefully
23 and then found that we did not discriminate against
24 Asian-Americans despite that evidence on the scores.

25 **Q.** Dean Fitzsimmons, I'd like to turn to page 8 of the

1 Plaintiff's Exhibit 2. Do you see that on the screen in
2 front of you?

3 **A.** Yes. I have it here, too. Yes.

4 **Q.** You understand that OIR ran -- you've seen in other
5 documents, which we're going to look at later, you understand
6 that OIR ran a logistic regression model in connection with
7 the Asian-American issue, correct?

8 **A.** They certainly ran some models for us, yes.

9 **Q.** In fact, we can just look at real quickly, you see on the
10 screen I've got page 11 of Plaintiff's Exhibit 2. You've
11 seen these bars, this kind of model before, correct?

12 **A.** Yes.

13 **Q.** You've seen that in other documents different than the
14 document we're looking at, correct?

15 **A.** Yes.

16 **Q.** So I'd like to look at some information back on page 8
17 related to that logistic model. This actually may not be the
18 same model, but this is the model being discussed here in P2.
19 And I'd like to ask you about the information that you see on
20 the screen.

21 And this is the odds of admission based on the
22 different categories that we see on the left. Do you see
23 that?

24 **A.** I do see that.

25 MR. LEE: Your Honor, I understand he's going to be

1 allowed to ask, but can we at least have the foundation
2 question so I can preserve my objection of whether he's seen
3 this page before?

4 THE COURT: Yes.

5 BY MR. HUGHES:

6 Q. Dean Fitzsimmons, is this part of the document that you
7 testified you have had a recollection of? Do you have a
8 recollection of page 8 of this document?

9 A. I really don't.

10 Q. So let's briefly move through it then. Again, this is a
11 chart that shows the odds of getting into Harvard based on
12 the different categories on the left. You see that, correct,
13 Dean Fitzsimmons?

14 A. I again don't -- I'm reaching beyond the limits of my
15 statistical knowledge. I'm surer Erin Driver-Linn could help
16 you or Dr. Card.

17 Q. Would you agree that having, for example, a high personal
18 rating would increase the odds of an applicant getting into
19 Harvard?

20 A. Again I don't know how this works, how they figured that
21 out from the logistic model. It's not in my purview.

22 THE COURT: I'm going to stop you there on this
23 line. It sounds like he's going to be guessing, to me.

24 MR. HUGHES: We're going to leave this momentarily.

25 BY MR. HUGHES:

1 **Q.** So again, Dean Fitzsimmons, I'm showing you now page 11
2 of Plaintiff's Exhibit 2. Is this part of the document that
3 you had a recollection of?

4 **A.** I do recollect that -- --

5 **Q.** Is page 11 of Plaintiff's Exhibit 2 -- page 11 of
6 Plaintiff's Exhibit 9 part of the document that you have a
7 recollection of seeing?

8 **A.** It's -- page 11 is something that I remember, but I don't
9 know whether I remember it being in this document or not.

10 **Q.** Is page 10 of Plaintiff's Exhibit 9 part of the
11 information you recall seeing in this document?

12 **A.** I'm less sure of this one, quite honestly.

13 MR. HUGHES: Let's move on to Plaintiff's
14 Exhibit 12. And this is a document entitled "Admissions and
15 Final Aid At Harvard College," from the office of
16 institutional research, dated February 13. I'd like to offer
17 this exhibit into evidence.

18 MR. LEE: No objection.

19 THE COURT: It's admitted.

20 (Patient Exhibit No. 12 admitted.)

21 BY MR. HUGHES:

22 **Q.** You were here on Monday for opening statements?

23 **A.** I was.

24 **Q.** And I think Mr. Lee said in his opening that this was a
25 presentation that was shown to you. Is that -- did you, in

1 fact, see this presentation back in 2013?

2 **A.** I did.

3 **Q.** And was this presentation shown to you at that
4 February 25 meeting that you and Ms. Donahue agreed to attend
5 with Dr. Driver-Linn from OIR?

6 **A.** I think so. That's right. Remember we're right in the
7 middle of regular action at that point and we have lots of
8 things going on, but I have a recollection of it.

9 **Q.** We saw that email earlier about February 25th.

10 **A.** Yeah.

11 **Q.** Do you remember who else was at that meeting besides
12 Dr. Driver-Linn and Ms. Donahue?

13 **A.** I'm not sure exactly. I would speculate -- I can
14 speculate if you want.

15 **Q.** I don't think we need speculation. Let's go ahead and
16 look at page 3 of Plaintiff's Exhibit 12. Again, this is a
17 document that was prepared by Harvard's office of
18 institutional research, correct?

19 **A.** That's correct.

20 **Q.** And is this part of the work that your office was
21 coordinating on with Harvard's office of institutional
22 research at least in part related to the concerns about --
23 that came around the Unz article and discrimination against
24 Asian-Americans?

25 **A.** That would certainly be part of it, to the best of my

1 recollection.

2 **Q.** There are obviously other subjects identified and
3 discussed in this document that don't relate to that,
4 correct?

5 **A.** That's correct.

6 **Q.** So we have at the top here of this OIR document, "Recent
7 admissions and financial aid questions raised."

8 Do you see that?

9 **A.** I do.

10 **Q.** And the first question is, "What is the effect on our
11 applicant pool and yield of reintroducing early action?"

12 That was something OIR was working on at the time
13 with your office?

14 **A.** That's correct.

15 **Q.** But that's one of the things that doesn't have anything
16 to do to do with Unz and claims of discrimination, correct?

17 **A.** That's correct.

18 **Q.** Okay. And then the second thing is, "Is the shift and
19 gender balance at Harvard College due to increased interest
20 and recruitment for SEAS?"

21 Again, that's a topic that doesn't have to do with
22 the discrimination issue, correct?

23 **A.** That would be correct.

24 **Q.** Okay. Then we have Number 3, "Does the admissions
25 process disadvantage Asians?"

1 That's the third topic, correct?

2 **A.** That's correct.

3 **Q.** And that's a topic your office was working on with the
4 office of institutional research at this time, correct?

5 **A.** Certainly one of the things, correct.

6 **Q.** Now, I want to look at the portion of this February 2013
7 presentation that relates to that question, the question of
8 whether the process disadvantages Asians.

9 So let's look at page 31 of Plaintiff's Exhibit 12.
10 I've got it up on the screen, Dean Fitzsimmons, but you're
11 welcome, of course, to follow along on paper or on the
12 screen.

13 Here on the screen, page 31 of P12, we've got
14 "Evaluating factors that play a role in Harvard College
15 admission."

16 Do you see that?

17 **A.** I do.

18 **Q.** Then if we turn to page 32, the next page, at the top of
19 the page it says, "Goal: Using various admissions ratings,
20 how well can we approximate admit rates by race/ethnicity and
21 the demographic composition of the admitted students pool?"

22 Do you see that?

23 **A.** I do.

24 **Q.** That was a goal of the analysis that OIR was working on
25 in coordination with your office, correct?

1 **A.** Yes. That's the goal they were working with, and they
2 had a variety of inputs, I'm sure.

3 **Q.** So then we've got strategy. The strategy here is to fit
4 a series of basic logistic regression models using data from
5 classes of 2007 to 2016.

6 Do you see that?

7 **A.** I do.

8 **Q.** That's ten years of data, correct?

9 **A.** Yes.

10 **Q.** And then it says, "Generate fitted probabilities of
11 admission, given an applicant's characteristics, how likely
12 they are to be admitted?"

13 Do you see that?

14 **A.** I do.

15 **Q.** The basic goal is to try to build a model that predicts
16 whether or not you'll get in based on the different variables
17 in the model, correct?

18 **A.** That's correct.

19 **Q.** And then for each class, "Select the 2,100 applicants
20 with the highest probability of admissions as our simulated
21 admitted class."

22 Do you see that?

23 **A.** I do.

24 **Q.** And then you examine the resulting demographics and admit
25 rates by ethnicity. That was the strategy here for this

1 analysis, correct?

2 **A.** That's correct.

3 **Q.** And then on the notes on the bottom, just to be complete,
4 students that didn't have an academic index weren't included,
5 correct?

6 **A.** That's correct.

7 **Q.** And this notes that the analysis was preliminary, bold
8 underlined, and for discussion. Correct?

9 **A.** That's correct.

10 **Q.** Now, if we go to the next page, we've got -- you remember
11 we've already looked at that colorful bar graph, and there's
12 four different bar graphs, right?

13 **A.** Maybe five.

14 **Q.** Actually, you're right. There's five.

15 **A.** Yeah.

16 **Q.** There's four different modeling choices, correct?

17 **A.** That's correct.

18 **Q.** And then the first one, academic only, the OIR starts
19 with the academic index and the academic rating, correct?

20 **A.** Correct.

21 **Q.** And then in the second model, OIR adds in the preferences
22 for legacies and athletes, correct?

23 **A.** That's correct.

24 **Q.** While keeping in academic index and academic rating,
25 correct?

1 **A.** Correct.

2 **Q.** And then in the third model keeps in academic index,
3 academic rating, legacy, athlete, and then adds in the
4 personal rating and the extracurricular rating, correct?

5 **A.** Correct.

6 **Q.** And then in the fourth model keeps everything that was in
7 the third model and adds gender and ethnicity, correct?

8 **A.** That's correct.

9 **Q.** And then if we look at page 34 of Plaintiff's Exhibit 12,
10 I just want to walk through kind of what happens in each of
11 those models. Okay?

12 **A.** Yes.

13 **Q.** Just to orient everybody who maybe hasn't seen this
14 document, what we have on the screen, the first four bars
15 going from left to right, those are the first -- those are
16 the four models that you and I just discussed, correct?

17 **A.** That's correct.

18 **Q.** And then the fifth column is what the actual admitted
19 class would look like, correct?

20 **A.** That's correct.

21 **Q.** And the way the different colors in the bars here
22 represent different races or ethnicities, correct?

23 **A.** That's correct.

24 **Q.** And the bottom, which is I think the color black is for
25 white applicants, correct?

1 **A.** That's correct.

2 **Q.** And then the second color, which I guess is olive-green
3 or brown, whatever it is, that is for Asian applicants,
4 correct?

5 **A.** Correct.

6 **Q.** What would you call that color?

7 **A.** I have no idea.

8 **Q.** I'm not the only one. Okay.

9 Then as we move up, we've got more of the maroon
10 color, and that is for African-American applicants, correct?

11 **A.** You did unknown, right?

12 **Q.** I'm sorry. We've got unknown, which is a gray color,
13 correct?

14 **A.** That's correct.

15 **Q.** Right above Asian applicants?

16 **A.** Yes.

17 **Q.** And then we go up and the next color, maroon,
18 African-American applicants, correct?

19 **A.** That's correct.

20 **Q.** And then we've got going up, international, light gray;
21 Hispanic, pinkish; and then Native American, light pink.
22 Correct?

23 **A.** That's correct.

24 **Q.** Okay. The first I want to focus on what happens to these
25 different demographic groups as we march through the models.

1 In the first model if Harvard -- according to OIR,
2 if Harvard only considered academics, the model predicts that
3 Harvard's admitted class would be over 43 percent
4 Asian-American, correct?

5 **A.** That's correct.

6 **Q.** And it predicts that the admitted class would be
7 38 percent white, correct?

8 **A.** That's correct.

9 **Q.** And .67 percent African-American, correct?

10 **A.** Correct.

11 **Q.** And 2.42 percent Hispanic, correct?

12 **A.** Correct.

13 **Q.** That's academics only. That's not what Harvard does in
14 its admissions office, correct?

15 **A.** That's right. And as we said in the *Bakke* decision and
16 in OCR and lots of other times.

17 **Q.** Then we move and we add in legacies and athletes. That's
18 what's happening in Model 2, correct?

19 **A.** That's correct.

20 **Q.** And when we that happens, we see that the Asian-American
21 applicants go from 43 percent down to 31.4 percent, correct?

22 **A.** That's correct.

23 **Q.** Those preferences for legacies and athletes don't help
24 Asians as a group in terms of admission to Harvard, according
25 to this model, correct?

1 **A.** According to the model, yes.

2 **Q.** The fact that the Asian-American admission rate goes down
3 from Model 1 to Model 2 when we add in the legacies and
4 athletes is consistent with what Harvard has told OCR about
5 the effect of legacies and athletes on the relative admission
6 rates between white and Asian-American applicants, correct?

7 **A.** Yes. Those are two important institutional factors.

8 **Q.** And then if we add in legacy and athlete preferences,
9 African-American admissions predicted to go up to 1.83, and
10 Hispanic stays basically the same, a little bump, to 2.62.

11 Do you see that?

12 **A.** I do.

13 **Q.** Those changes are consistent with what you know, based on
14 your experience as dean, that the legacy and athlete
15 preferences primarily -- at least at this time, and you've
16 told me yesterday that's changing -- at least at this time
17 primarily benefit white applicants, correct?

18 **A.** That's right. And you're right about "at this time."

19 **Q.** Then we move to Model 3 where we add in the
20 extracurricular and personal ratings.

21 Do you see that?

22 **A.** I do.

23 **Q.** You've already told me yesterday that as a group
24 Asian-Americans are awarded on average higher personal
25 ratings -- I'm sorry -- higher extracurricular ratings than

1 white applicants. That's correct, right?

2 **A.** Yes.

3 **Q.** So here we've got those two variables, extracurricular
4 and personal. And so we see here when you add in those
5 variables that the predicted Asian admission to Harvard goes
6 from 31 percent to 26 percent, correct?

7 **A.** That's correct.

8 **Q.** And we know that Asian-Americans are doing better as a
9 group on the extracurricular score, so what is likely doing
10 the work here is lower personal ratings for Asian-Americans
11 as a group, correct?

12 **A.** That sounds logical, yeah.

13 **Q.** And then we see that when you add in extracurricular and
14 personal rating, African-Americans as a group, their
15 projected admission goes from 1.83 up to 2.36, correct?

16 **A.** That's correct.

17 **Q.** And Hispanic applicants as a group go up from 2.62 to
18 4.07, correct?

19 **A.** That's correct.

20 **Q.** And the white applicants go from 48 percent up to
21 50 percent, correct?

22 **A.** That's correct.

23 **Q.** So of the four groups that the experts have focused on --
24 white applicants, Asian-American applicants,
25 African-American, and Hispanic applicants -- only the

1 Asian-American applicants go down once you add in the
2 extracurricular and personal rating, correct?

3 **A.** That's what this says, yes.

4 **Q.** That's what was communicated to you when you received and
5 reviewed this document in February 2013, correct?

6 **A.** That's correct.

7 **Q.** The chance of Asian admission was going down when you
8 consider extracurricular and personal scores, correct?

9 **A.** That's correct.

10 **Q.** Then we move to the last -- sorry, not the last, the
11 fourth column. And we keep all the other variables in and
12 then we add in ethnicity and gender, correct?

13 **A.** That's correct.

14 **Q.** And what happens when we do that is that Asian-American
15 applicants, their chance of admission to Harvard comes down
16 yet again, correct?

17 **A.** That's correct.

18 **Q.** It comes down -- it's highest in Model 1 and then it just
19 comes down, down, down, correct?

20 **A.** That's correct.

21 **Q.** And in Model 4, once you add in demographic factors, the
22 chance of Asian-Americans getting admitted to Harvard drops
23 from 26 to 18 percent, correct?

24 **A.** That's correct.

25 **Q.** There's also a drop for white applicants from 51 to

1 44 percent, correct?

2 **A.** Correct.

3 **Q.** And there's a significant increase for African-American
4 applicants from 2.36 to 11.12, correct?

5 **A.** That's correct.

6 **Q.** I want to correct something, Dean Fitzsimmons, that I was
7 getting wrong here.

8 What we're looking at here is the share of each
9 class by ethnicity, correct?

10 **A.** What was the other dimension you thought?

11 **Q.** I think I might have said "chance of admission."

12 But what we're at -- on a couple of questions. But
13 what we're looking at from bar graph to bar graph is the
14 first one, the share of Asian-Americans in the class would be
15 43 percent. Second one comes down to 31. Third one comes
16 down to 26, right? That's what you understand this to show?

17 **A.** That's correct, yes.

18 **Q.** So if we look at, going back to the demographics, once
19 you add in gender and race, again the share of the projected
20 class for Asians comes from 26 to 18, correct?

21 **A.** Yes. And I knew that's what you meant before.

22 **Q.** Yes. Sometimes it's hard to keep all the language
23 straight.

24 And again, the share of the class for white
25 applicants goes from 51 to 44, correct?

1 **A.** That's correct.

2 THE COURT: What does gender mean in this? I'm
3 going to leave it to you, Mr. Hughes to sort out, but what
4 does gender mean in this category? I take it the ethnicity,
5 we're talking about a tip one way or the other; is that
6 right? But how does gender factor in?

7 MR. HUGHES: It's not reported in these bars. The
8 way that we know that it was factored in is that if we look
9 at page 33 in the fourth model, the two variables that are
10 factored in are gender and ethnicity.

11 THE COURT: I see that. But can you see if he
12 knows what it means to factor in gender on this?

13 MR. HUGHES: It's a variable in the model.

14 THE COURT: That cuts which way? On gender why
15 would the number go up or down?

16 MR. HUGHES: I think that the experts will agree
17 that it doesn't have a significant effect on way or the
18 other.

19 MR. LEE: Whoa, whoa, whoa.

20 MR. HUGHES: But I'm not the master of that part of
21 the case.

22 THE COURT: That's my bad.

23 If you can elicit it from this witness, I would
24 appreciate the clarification. If you can't -- and I leave it
25 to you whether you want to ask the question now or not. If

1 it can't be elicited through this witness and you want to
2 elicit it through someone later, but I am curious about
3 whether -- which way -- most of these I understand how they
4 cut. Right? You get a higher personal rating and it makes
5 your chance of getting in -- the percentage of the class goes
6 up. But the gender thing, I'm not sure what it means. If he
7 can do it, fine; if he can't, we'll wait.

8 MR. HUGHES: I have an idea.

9 BY MR. HUGHES:

10 Q. Dean Fitzsimmons, does the Harvard admissions process
11 provide a tip for applicants based on gender?

12 A. No.

13 Q. So pretty much gender doesn't make a difference per se
14 one way or the other in terms of admission to Harvard?

15 A. That would be correct.

16 Q. And you can see that gender is a variable in this model.
17 Do you see that?

18 A. It is. It's a rough model. For some reason they decided
19 not to give you more description of it. But it is in the
20 model according to page 33, and then it doesn't show the
21 effect obviously on 34.

22 Q. Given that your testimony is that gender per se doesn't
23 make a difference one way or the other, you wouldn't expect
24 that to change things in the model?

25 A. Right. It would simply -- I think you should ask the

1 experts on this, though, just for the definitive piece. But
2 that's generally the case is that women and men get in at
3 about the rate at which they apply. As with anything else,
4 there are certainly variations from year to year because the
5 individuals vary from year to year.

6 **Q.** Okay.

7 **MR. HUGHES:** Your Honor, did that address the
8 question?

9 **THE COURT:** Yes. Thank you.

10 **BY MR. HUGHES:**

11 **Q.** So, Dean Fitzsimmons, let's keep talking here about
12 page 34. We see that the share of the class that is
13 Asian-Americans once we add in personal score and
14 extracurricular goes down, goes down again once we add in
15 demographics. We've reviewed that together, correct?

16 **A.** That's correct.

17 **Q.** Then when we compare the final model, Model 4, to the
18 actual admitted class, we see that Model 4 comes pretty close
19 to predicting the share of each ethnicity in the actual
20 admitted class.

21 Do you see that?

22 **A.** I do. And it's very consistent with what we've talked
23 about before, you know. It's not simply a matter of looking
24 at test scores and grades or academics alone. The more
25 factors you add in to try to predict admission, the closer

1 you will come to the class. As rough a model as this is, it
2 was perfectly -- ultimately quite consistent with what the
3 actual class was and what we have known over of the decades.

4 **Q.** So did the fact that Model 4 lined up pretty closely with
5 the actual model and what you've known over the decades, did
6 that -- that suggested that the model was reliable, right?

7 **A.** It certainly came up with a -- in a very rough way with a
8 very small number of variables; for example, Professor Card
9 looked at 200 variables. Here you've got obviously a very
10 small number of variables. They're important variables,
11 obviously, but again very consistent with what we've known in
12 the past and very consistent with the actual class at the
13 moment.

14 **Q.** Mr. Lee said on Monday that this analysis basically
15 confirmed what you already knew and it wasn't a cause for
16 concern.

17 Is that true, this analysis when it was presented
18 to you and you saw the impact of personal score and
19 demographics on Asian-American applicants, that wasn't a
20 concern to you?

21 **A.** It's always a concern any time, you know, we have to turn
22 anybody down. But I think if you were to go back even to the
23 *Bakke* decision and also certainly to the OCR decision, that
24 isn't simply how we do things. And the idea is that all of
25 these factors are important factors.

1 Then of course there are many, many others
2 identified by Professor Card.

3 But our job is just to make sure that these factors
4 are applied in an evenhanded way to everybody who applies
5 regardless of background. So that is quite consistent, when
6 you get down to the end of this, obviously quite consistent
7 with the actual Harvard class.

8 **Q.** At least as of the time that you got this analysis from
9 OIR, you were aware that inclusion of the extracurricular and
10 personal score would drive down the share of a class that was
11 Asian-American and drive it up for white, African-American,
12 and Hispanic applicants, correct?

13 **A.** Again just going back even to the *Bakke* decision, but
14 certainly to OCR, this is very, very consistent. We've said
15 to people constantly over the years that our process does
16 include as factors legacy, athlete, extracurricular,
17 personal, and various demographic factors.

18 So you know, there will be changes as you go
19 through the models, but this is very consistent with what we
20 have said all along and been found to be certainly not any
21 indication of discrimination by OCR, among others.

22 **Q.** With respect, sir, my question had nothing to do with
23 *Bakke* or OCR. It had to do with what the model shows.

24 I want to focus on the difference between Model 2
25 and Model 3. The things that are added in between those two

1 models, the things that drive all the change are
2 extracurricular and personal score, correct?

3 **A.** They are certainly factors that made a difference, you're
4 correct, as you went from 2 to 3.

5 **Q.** And what is being communicated to you here in February
6 of 2013, an analysis by OIR, is that when you factor in the
7 personal score and the extracurricular score, the share of
8 Asian-Americans in the projected class goes down, and the
9 other three groups that are being focused on here -- White
10 applicants, African-American applicants, Hispanic
11 applicants -- go up, correct?

12 **A.** Right. The numbers are what they are. But again, those
13 are two very important factors in our process.

14 **Q.** And you knew at the time that Asian-Americans were doing
15 better on the extracurricular rating. You've told me that,
16 correct?

17 **A.** That's correct.

18 **Q.** And so did it concern you when you were provided this
19 information that your admissions process might be penalizing
20 Asian applicants because of the personal quality score? Was
21 that a concern to you in February 2013?

22 **A.** Well, it's always a concern. But the personal quality
23 factor, you know, has been a factor we have talked about
24 consistently over time. And it certainly is a part of what
25 we do.

1 **Q.** Let's continue to look at this document. Page 36 of
2 Plaintiff's Exhibit 12 is entitled "What Have We Learned?"
3 Correct?

4 **A.** That's correct.

5 **Q.** And what OIR says, "Once we account for ratings and
6 demographic factors, we can closely predict what the admitted
7 class will look like." Correct?

8 **A.** That's correct.

9 **Q.** "With current data, we explain a significant amount of
10 the variation in admission, but further details (especially
11 around the personal rating) may provide further insight."

12 That's what OIR says, correct?

13 **A.** That's correct.

14 **Q.** And you didn't follow up with OIR to figure out further
15 details around the personal rating, correct?

16 **A.** That's correct. Because what we saw here was perfectly
17 consistent with what we've seen for decades, as I said
18 before.

19 **Q.** And then it ends saying, "There are a variety of factors
20 that quantitative data is likely to miss or ratings do not
21 capture. We'd like to understand exceptional talent, music,
22 art, writing, the role of context cases, the role of personal
23 statement/essay, measures of socioeconomic status," correct?

24 **A.** That's correct. Among other things.

25 **Q.** You didn't follow up with OIR to figure out how those

1 things play a role after this, did you?

2 **A.** We certainly were interested and followed up on
3 socioeconomic status, among other things.

4 But I think we've always had a very clear sense
5 that, again with exceptional talent or the other factors,
6 as -- I don't want to repeat myself. But yesterday we talked
7 about how we really do look at everything when we go through.
8 So we've known that these have long been factors in our
9 process, and I think the world knows that.

10 **Q.** The one thing that you followed up with OCR -- with OIR,
11 which we'll talk about in a minute, you did follow up and ask
12 for more research on socioeconomic -- low-income issues,
13 correct?

14 **A.** Yes. Not with OCR, but -- I'm just kidding. OIR, yep.

15 **Q.** Now, turning to page 37. "Next steps. Determining
16 priorities, timing, and audiences."

17 Do you see that?

18 **A.** Yes.

19 **Q.** It says, "Should this work be shared with additional
20 audiences (e.g., President Faust, Dean Smith, Dean Hammonds)?
21 What are your priorities?"

22 Do you see that?

23 **A.** Yes, I do.

24 **Q.** This a presentation that OIR is presenting to you on
25 February 25?

1 **A.** Yes. And obviously data that they have themselves now
2 knowledge of.

3 **Q.** And you decided not to share the work with President
4 Faust, Dean Smith, and Dean Hammonds, correct?

5 **A.** There's lots of information, as you indicated before, in
6 this very lengthy report. But it was certainly good to have
7 the information about early admission, for example, and what
8 the effect was of bringing it back. And it was obviously
9 good to have an understanding of what was going on with our
10 new and very, very rapidly growing School of Engineering and
11 Applied Sciences, especially as it relates to gender.

12 The third part of it, again, there was no
13 preliminary study. It was very incomplete, as they said, and
14 it literally took us right to where the actual class was, and
15 again, very consistent with what we've always said over time.
16 So it was good to have this information.

17 **Q.** It was good for you to have the information that we just
18 looked at, but you didn't share that information with
19 President Faust, Dean Smith --

20 **A.** Not immediately at that point. Of course, remember that
21 we were sitting in the middle of the busiest time of the year
22 in regular action looking at 40 -- no, at that time I guess
23 it was more like 35,000 applicants.

24 **Q.** You didn't share it with your boss, Dean Smith, or the
25 president -- or President Faust, right?

1 **A.** That's correct.

2 **Q.** And now I want to talk about who else you didn't tell.

3 MR. LEE: Your Honor, just for clarity purposes, is
4 he talking about the entire report? You didn't tell them
5 anything about the entire report?

6 MR. HUGHES: I'm talking about the pages that we
7 were with just talking about, starting at page 31. I think
8 the record is crystal clear on that.

9 MR. LEE: That was my concern.

10 BY MR. HUGHES:

11 **Q.** So, Dean Fitzsimmons, remember earlier we had a somewhat
12 laborious walk through the privilege log. I have one more
13 time that I'd like to look at that with you. Do you have
14 that handy?

15 **A.** Let me see. I have it handy.

16 **Q.** And I've got a red tab --

17 MR. HUGHES: Your Honor, would you like a copy of
18 the privilege log?

19 THE COURT: If you're just going to have him do
20 what you've done, I don't need it.

21 MR. HUGHES: Okay. Thank you, Your Honor.

22 BY MR. HUGHES:

23 **Q.** I've got a red tab that should be on page 10 of the log.
24 Do you see that?

25 **A.** I do. I was wondering what that red tab was.

1 **Q.** It's to help us both move things along. So here, just to
2 remind you, the document that we were just looking at was
3 from -- that's still up on the screen, Plaintiff's
4 Exhibit 12, was from February of 2013, correct?

5 **A.** That's correct.

6 **Q.** Showing it at a meeting on February 25, correct?

7 **A.** That's correct.

8 **Q.** And then now we're looking at the privilege log, do you
9 recall that there was an OCR request to your office in April
10 of 2013?

11 **A.** I don't recall precisely to, be honest, but --

12 **Q.** You do see on the privilege --

13 **A.** I see it. So I assume something came in at that point.

14 **Q.** So there's two entries here between Ms. Yong and you,
15 subject matter: First pass, OCR request, date April 10,
16 2013. Correct?

17 **A.** That's correct.

18 **Q.** Okay. And now I'd like to show you Plaintiff's
19 Exhibit 515, which is correspondence from the same time
20 between you and Mr. Hibino. And I'd like to offer that into
21 evidence.

22 MR. LEE: No objection.

23 THE COURT: Admitted.

24 (Plaintiff Exhibit No. 515 admitted.)

25 BY MR. HUGHES:

1 Q. Thank you, Your Honor. And I've got it here on the
2 screen, Dean Fitzsimmons.

3 A. It's a little blurry, so I think I'll just go with the
4 paper.

5 Q. I've blown it up for you. There we see, we've got an
6 email exchange between Mr. Hibino and you with a date of
7 April 10, 2013.

8 Do you see that?

9 A. Excuse me. I do.

10 Q. It's P516.

11 A. I have it. Yes, I do.

12 Q. And that's the same date we saw in the privilege log for
13 the email exchange between you and Ms. Yong, correct?

14 A. That's correct.

15 Q. And then I want to blow up part of that email from
16 Mr. Hibino to you. Mr. Hibino is writing to your
17 assistant -- you're copied on this email right here, correct,
18 Dean Fitzsimmons?

19 A. This is the one you have on the screen?

20 Q. On the screen.

21 A. Yes.

22 Q. Okay. He's talking to your assistant, but you received
23 these emails, correct?

24 A. Yes.

25 Q. We've got this email dated April 10, 2013. "In case he

1 is not reading his emails, I wanted to ask him one other
2 question from our call this morning. Regarding the impact of
3 legacy on Asian-American applicants, what proportion of
4 Asian-American applicants are legacies and what proportion of
5 white applicants are legacies?"

6 Do you see that?

7 **A.** I can, yes.

8 **Q.** And do you recall at this time that OCR was looking at a
9 potential claim of discrimination, an individual claim
10 against Asian-American applicant?

11 **A.** I do have a recollection. I'm not quite sure of the
12 precise details.

13 **Q.** But it relates to that general issue, correct?

14 **A.** Yes.

15 **Q.** And that's what these documents concern, correct?

16 **A.** That's correct.

17 **Q.** And Mr. Hibino is asking you about legacy issues
18 surrounding that, correct?

19 **A.** That's right. Again, it's the cross-tab between
20 Asian-American and legacies and whites.

21 **Q.** I want to go back to Plaintiff's Exhibit 12, page 34.

22 When you were having this dialogue and
23 correspondence with Mr. Hibino in April, just a little more
24 than a month after you'd been presented this information by
25 Harvard's Office of Institutional Research, did you tell

1 Mr. Hibino that even after you factor in the legacy and
2 athlete preferences that doesn't explain away all the
3 differences between white and Asian-American admissions to
4 Harvard? Did you communicate to him what you'd learned from
5 OIR?

6 **A.** I think he was just simply asking me about the numbers of
7 legacies who are Asian-American and white. I don't think he
8 was asking me the question you just posed.

9 **Q.** You didn't tell him, you know, we used to say legacies
10 and athletes explained everything. OIR's now run some models
11 that might call that into question. You didn't volunteer
12 that to Mr. Hibino, correct?

13 **A.** Well, again, he simply asked me for some fairly limited
14 information. Again, these were again very unremarkable
15 results here, again consistent with what we had done and what
16 they had looked at actually, what, 20-something years ago.

17 **Q.** Let's keep moving on through 2013. Later on in April
18 of 2013 after this dialogue with Mr. Hibino --

19 **A.** Where are you now?

20 **Q.** I'm sorry. I'll take this off the screen. I'm going to
21 ask you a question unrelated to a document.

22 **A.** Okay.

23 **Q.** In April of 2013, you asked the Office of Institutional
24 Research to look into the question of whether low-income
25 students receive a tip in the admissions process, correct?

1 **A.** I did.

2 **Q.** And I want to just look at -- show you Plaintiff's
3 Exhibit 19 and offer it into evidence.

4 **A.** This is P19?

5 **Q.** I'm waiting to see if we get it into evidence.

6 MR. LEE: No objection.

7 THE COURT: Admitted.

8 (Plaintiff Exhibit No. 19 admitted.)

9 BY MR. HUGHES:

10 **Q.** Here we have an email from Erica Bever. Do you see that?

11 **A.** I do.

12 **Q.** The date of the email is April 15, 2013, correct?

13 **A.** That's correct.

14 **Q.** At that time, Ms. Bever worked in -- she was the
15 assistant director, as we can see from her signature, of the
16 Office of Institutional Research, correct?

17 **A.** That's correct.

18 **Q.** And, Dean Fitzsimmons, Ms. Bever actually works for you
19 now in the admissions office, correct?

20 **A.** That's correct.

21 **Q.** But at this time she was with OIR, and she's writing you.
22 Subject is "Follow up," and copying Dr. Driver-Linn, Mark
23 Hansen.

24 She says, "Hi, Fitz. Mark and I will be putting
25 together materials for the two requests you discussed with

1 Erin on Friday. One, Dean Smith's tuition versus income
2 growth question; two, low-income students in admissions.
3 We're aiming to get you materials to review no later than the
4 end of the week."

5 Do you see that?

6 **A.** Yes, I do.

7 **Q.** And you recall asking for this work to be performed,
8 correct?

9 **A.** I did.

10 **Q.** The people that were performing this work,
11 Dr. Driver-Linn, Ms. Bever, were some of the same people that
12 worked on the work we just looked at in Plaintiff's
13 Exhibit 12, correct?

14 **A.** That's correct.

15 **Q.** When you asked him to do this additional work on
16 low-income students and admissions, you didn't tell them not
17 to run a logistic regression model, correct?

18 **A.** Well, they had done the work, so I'm not sure what you're
19 asking me.

20 **Q.** You weren't saying it's not a good idea to keep analyzing
21 our admissions process with logistic regression models. You
22 were fine with them continuing to do that, correct?

23 **A.** They had submitted the data. We had discussed it. And
24 again, the five models -- again, the four models were again
25 very consistent with the past. But I'm not quite sure what

1 you were expecting me to ask here.

2 **Q.** Just a very simple question. You were perfectly
3 comfortable with them continuing to analyze admissions data
4 using the logistic regression models that they employed,
5 correct?

6 **A.** Really, whatever they wanted to do. Whatever they
7 thought could be helpful to us.

8 **Q.** And you had confidence, of course, that your colleagues
9 at OIR would provide you robust and reliable work, correct?

10 **A.** Yes.

11 **Q.** That's a serious office that does serious work on behalf
12 of Harvard, correct?

13 **A.** That's correct.

14 **Q.** And remember we saw back in Plaintiff's Exhibit 12 that
15 one of the things that OIR was using in its model was the
16 academic index.

17 Do you recall that?

18 **A.** Yes.

19 **Q.** And you didn't suggest to them, hey, it's not a good idea
20 to use the academic index. You trusted them to pick reliable
21 variables, correct?

22 **A.** We trusted them to do good research.

23 **Q.** Now I want to show you Plaintiff's Exhibit 21 and offer
24 it into evidence.

25 MR. LEE: No objection.

1 THE COURT: It's admitted.

2 (Plaintiff Exhibit No. 21 admitted.)

3 MR. HUGHES: Thank you, Your Honor.

4 BY MR. HUGHES:

5 Q. And here we've got an email from Ms. Bever, dated
6 April 22, 2013, to you, copying others, correct?

7 A. That's correct.

8 Q. And this is about a week after the email that we just
9 looked at, correct?

10 A. That's correct.

11 Q. And Ms. Bever says, "Dear Bill. I'm attaching two sets
12 of slides for your review. Number one, low-income exhibits.
13 This set of slides examines difference in admission rates for
14 low-income students and all other students."

15 Do you see that?

16 A. Yes, I do.

17 Q. Okay. And then those low-income slides are attached to
18 this email, as she just said. I've got the second page of
19 Plaintiff's Exhibit 21 on the screen.

20 Do you recall getting this information from OIR
21 concerning low income?

22 A. I do.

23 Q. Okay. And what we've got here is we've got a chart that
24 shows income along the bottom, correct?

25 A. That's correct.

1 Q. And we've got SAT scores as the other metric, correct?

2 A. That's correct.

3 Q. And the title, the note here in the bullet point is that
4 income and SAT scores are positively related, correct?

5 A. That's correct.

6 Q. Okay. Just the basic idea is the more resources you
7 have, that would be at least correlated with a likelihood of
8 getting a higher SAT score, correct?

9 A. Yes.

10 Q. Okay. Then we go to the next slide. And what OIR does
11 is uses SAT as a proxy for admissions qualifications. We see
12 at every score level lower-income students have higher admit
13 rates.

14 Do you see that?

15 A. I do.

16 Q. Again, this was data that you asked for and was presented
17 to you by OIR, correct?

18 A. That's correct.

19 Q. You remember getting this data, correct?

20 A. I do.

21 Q. And what we've got along the bottom here are SAT scores
22 it looks like ranging from 600 up to 800, perfect, correct?

23 A. That's correct.

24 Q. Okay. And here what we have is we have a comparison of
25 the likelihood of admission for similarly qualified academic

1 candidates, correct?

2 **A.** Yes. That's the analysis.

3 **Q.** This is good analysis in the sense it makes sense
4 sometimes to look at similarly qualified academic candidates
5 when analyzing the Harvard admissions process, correct?

6 **A.** It's certainly one way to do it.

7 **Q.** And a way that OIR, your colleagues at OIR did, correct?

8 **A.** That's correct.

9 **Q.** The work that you asked for, correct?

10 **A.** That's correct.

11 **Q.** Okay. And so what we see here actually is that even
12 though getting a higher SAT score is at least correlated with
13 more money, more resources, it turns out in the Harvard
14 admissions process, if you have people with similarly
15 academic qualifications, low-income socioeconomic applicants
16 are more likely to get in to Harvard than a similarly
17 qualified non-disadvantaged applicant, correct?

18 **A.** Yes. It could serve in a sense as a tip factor.

19 **Q.** You were actually -- based on some things that had been
20 reported in the literature, you were actually looking into
21 whether the Harvard admissions process could provide a tip
22 for -- did provide a tip, in fact, for low-income applicants,
23 correct?

24 **A.** Yes. We wanted empirical proof of it.

25 **Q.** And you asked OIR to get that empirical proof, correct?

1 **A.** That's correct.

2 **Q.** And that's what this is. This was empirical proof of
3 that tip, correct?

4 **A.** Yes.

5 **Q.** And then we go to the next slide. And again, these are
6 predicted and actual admit rates by income band.

7 Do you see that?

8 **A.** I do.

9 **Q.** And this is page 3 of the slides. It's actually page 4
10 of Plaintiff's Exhibit 21. And I want to just walk through
11 what this is showing. If we look at the bottom, we have the
12 maroon is the predicted admit rate.

13 Do you see that?

14 **A.** I do.

15 **Q.** And then the white with the maroon outline around it is
16 the difference between the predicted and actual admit rates,
17 correct?

18 **A.** Correct.

19 **Q.** And then the diamond, black diamond is the actual admit
20 rate, correct?

21 **A.** That's correct.

22 **Q.** And then what we do here, they kind of explain what
23 they've done. OIR says, "Predicted admit rates by income are
24 based on logistic regression models that control for academic
25 index, academic rating, athlete, legacy, extracurricular

1 rating, personal rating, ethnicity, and gender."

2 Do you see that?

3 **A.** I do.

4 **Q.** And then it describes the conclusions that are shown in
5 the bar graph here, that "low-income students are admitted at
6 higher rates than predicted. Higher income students are
7 admitted at a lower rate."

8 Correct?

9 **A.** That's correct.

10 **Q.** And then it describes the pseudo R-squared of the model,
11 correct?

12 **A.** That's correct.

13 **Q.** This was more of the empirical evidence that OIR provided
14 to you showing that, in fact, there is a tip for low-income
15 applicants to Harvard, correct?

16 **A.** That's correct.

17 **Q.** Now I'd like to show you Plaintiff's Exhibit 604.

18 MR. LEE: Are you going to offer it?

19 MR. HUGHES: I'm sorry, Mr. Lee.

20 I offer Plaintiff's Exhibit 604 into evidence.

21 MR. LEE: I would object because this witness is
22 not on this email chain.

23 THE COURT: Hold on. Let me look at it.

24 MR. HUGHES: If I may be heard, Your Honor?

25 THE COURT: Let me read it first and then you can

1 definitely be heard.

2 I'm not going to admit -- you can be heard, but let
3 me tell you what my preliminary thought is. I'm not going to
4 admit the exhibit through this witness. He's not on it, and
5 I don't know that he's ever seen it before. But to the
6 substance that, for example, he -- it reflects that he has
7 some information he wants to share, if you want to ask him
8 about that, you can.

9 MR. HUGHES: He was shown it in preparation for his
10 30(b)(6) deposition, but we can get that out here.

11 THE COURT: Okay. Any objection to it being on the
12 screen, Mr. Lee?

13 MR. LEE: Pardon, Your Honor?

14 THE COURT: Any objection to it being on the
15 screen?

16 MR. LEE: No.

17 THE COURT: It can be shown, Karen.

18 BY MR. HUGHES:

19 Q. Now, Dean Fitzsimmons, do you have the paper version of
20 this in front of you?

21 A. Is this still 604?

22 Q. Yes, sir. This is Plaintiff's Exhibit 604.

23 A. Okay.

24 Q. Sir, you see there's a sticker on there that has your
25 name on it, "Fitz," with the number 19 in the lower

1 right-hand corner?

2 **A.** Yes, I do.

3 **Q.** And you recall being shown this document during your
4 deposition?

5 **A.** I don't, to be honest, but it was ten hours videotaped.

6 **Q.** I just want to refresh your recollection on this because
7 it's not a memory contest. If you want to pull out your
8 deposition and turn to page 417.

9 **A.** Let's see. It's the binder. Okay. 417?

10 **Q.** 417. I'll remind you that this was Exhibit 19 to your
11 deposition. I just want you to read to yourself starting at
12 417, line 22, stopping at 418, line 8. And let me know when
13 you've finished reading --

14 **A.** So 417 from -- excuse me?

15 **Q.** 417, 22, to 418, line 8.

16 **A.** I'm sorry. How far down do you want me to read?

17 **Q.** Line 8.

18 **A.** Can I just finish? One second.

19 **Q.** Sure. Take your time.

20 **A.** Okay.

21 **Q.** Now that you've refreshed your recollection, do you agree
22 that you saw this during your deposition and it was shown to
23 you in preparation for your deposition? That's what you
24 testified to.

25 **A.** That sounds right.

1 **Q.** So now let's take a look at the document. The second
2 page, let's orient everybody to the date. We've got an email
3 from Dr. Driver-Linn to Christine Heenan, and the date is
4 Sunday, April 28, 2013, correct?

5 **A.** That's correct.

6 **Q.** And remember we just looked at those slides that provided
7 that empirical evidence that Harvard was giving a tip to
8 low-income students? Do you remember looking at Plaintiff's
9 Exhibit 21 just a few minutes ago?

10 **A.** I do.

11 **Q.** And do you have in mind that the date of Plaintiff's
12 Exhibit 21 was just a few days before? Plaintiff's
13 Exhibit 21 was April 22. Do you have that in mind?

14 **A.** I do.

15 **Q.** Okay. So this is an email exchange that you're not on,
16 but it concerns you, and it's occurring just a few days after
17 OIR has sent you its empirical data that establishes that
18 low-income students get a tip, correct?

19 **A.** Yes. That sounds right.

20 **Q.** Okay. And Dr. Driver-Linn works for OIR, correct?

21 MR. LEE: No, Your Honor. He's asked this question
22 20 times about Dr. Linn and OIR. And I'm getting a little
23 worried about the time.

24 MR. HUGHES: We all know who Dr. Driver-Linn is.

25 BY MR. HUGHES:

1 **Q.** Who is Christine Heenan?

2 THE COURT: The objection took longer than the
3 question would have. Go ahead.

4 BY MR. HUGHES:

5 **Q.** Who is Christine Heenan?

6 **A.** Christine Heenan was our vice president for public and
7 community affairs, I think the title was at the time. I
8 can't be exact.

9 **Q.** She's no longer with Harvard. But when she was, she was
10 one of the top PR people at Harvard, correct?

11 **A.** That's correct.

12 **Q.** Was she the very top PR person or just one of a handful
13 at the top?

14 **A.** I think you could say that. I'm not totally familiar
15 with the organizational structure of public and community
16 affairs, but she certainly -- you could make that case.

17 **Q.** Dr. Driver-Linn is communicating with Ms. Heenan a few
18 days after you received the slides we just looked at.

19 And she says, "Hi, Christine. Hope all is well.
20 Also would like to give you have a heads-up about some
21 analysis and correspondence we've been having with Fitz.
22 He's excited to share more broadly. I believe he is going to
23 be in touch with Jeff Neal tomorrow, but I'd like to make
24 sure you've had a chance to think through implications, not
25 entirely straightforward."

1 Do you see that?

2 **A.** I do.

3 **Q.** And do you remember in the few days after you'd received
4 the information you'd asked for showing that there was
5 empirical evidence of a tip for low-income applicants being
6 excited to share that information?

7 **A.** I'm not sure I would have used the word "excited," but
8 there's certainly been a great deal of discussion out in the
9 world about the issue. And it was very good, frankly, for us
10 to see that it was confirmed.

11 **Q.** There was some criticism that low-income applicants might
12 not be getting a tip. OIR found they were, in fact, getting
13 a tip, empirical evidence, provided that to you. Maybe you
14 wouldn't use the word "excited," but you thought that might
15 be something worth getting out there in the public, correct?

16 **A.** Certainly to, at some point, have the public be aware
17 that contrary to some speculation or research that this is
18 something that we do. Because I think we really wanted to
19 make sure we sent a message to people from poor and
20 modest-income backgrounds that Harvard was a real possibility
21 for them. And we had put in place two rounds of a really
22 quite dramatic change in financial aid. So it seems to me to
23 be something that we would -- if we were asked, for example,
24 we would want to let people know that poor people as well as
25 rich people should think about Harvard.

1 **Q.** You wanted to send the message to low-income applicants
2 that Harvard would give them a favor shake, even a tip, based
3 on the OIR research, correct?

4 **A.** Yes. And again, it's following the process.

5 **Q.** Now I want to look at the first page of P 604.

6 THE COURT: How much longer do you think you have
7 with this witness?

8 MR. HUGHES: Probably another 20 minutes or so. If
9 it's a good time for a break, this is fine.

10 THE COURT: I was thinking you would finish your
11 direct and we'd break and then start the cross at after
12 lunch. It doesn't sound like we're going to get that far.

13 MR. HUGHES: It just kind of depends on a couple of
14 things. I'd really defer to Your Honor.

15 THE COURT: Get to a good stopping place and we'll
16 take the lunch recess.

17 MR. HUGHES: I think now is as good as any.

18 THE COURT: Quarter of 1:00. All right, everyone?

19 MR. LEE: Your Honor, just if I could remind the
20 Court in the pretrial order we agreed to split the trial
21 time. We know you've given us three weeks. We've agreed to
22 split the trial time. I'm a little worried because we're
23 five and a half hours for this witness, and they have 16
24 other witnesses to go. And I haven't had a chance with him
25 yet.

1 THE COURT: He told me yesterday the pace is going
2 to pick up dramatically after this witness. And I will build
3 in what extra time I can for you in the next three weeks, or
4 you can make my next case settle and I'll give you the extra
5 time on the other end.

6 MR. LEE: I don't think I can do the latter so
7 we're going to have to try for the former.

8 MR. MORTARA: Your Honor, Adam Mortara for Students
9 for Fair Admissions. A lot of the information that Harvard
10 presumably will elicit from Dean Fitzsimmons has been
11 elicited, so we're going to be efficient. And I can
12 guarantee you, my direct -- my adverse direct of Senior
13 Admissions Officer Christopher Luby will be less than 30
14 minutes.

15 THE COURT: I am not trying to rush you, although I
16 will try to point out that they have the right to elicit the
17 information from their witness in their own way. Although
18 I'm sure they're appreciative of the efforts you're making on
19 their behalf.

20 I'm not trying to rush you. I'm trying to give you
21 what time you need. If just you tell me two weeks, then you
22 tell me three, and I've adjusted my schedule to accommodate
23 the third. I will do what I can to give you the extra time.
24 We'll just keep track of it.

25 Can I ask you one favor before we go? The

1 discussion that we had this morning, someone left me with a
2 copy of half of it but not the other half. Can someone get
3 me a copy of the other half as well? I have 513.

4 Take 45 minutes, so it's a little after a quarter
5 of.

6 (Court recessed at 12:05 p.m.)

7 *** AFTERNOON SESSION ***

8 MR. HUGHES: Welcome back, Dean Fitzsimmons.

9 THE COURT: I'm sure he's happy to be here.

10 BY MR. HUGHES:

11 **Q.** We're going to try to finish this up and then turn it
12 over to Mr. Lee.

13 Just to reorient where we were, we were marching
14 through April. We looked at the April 22 slides that you got
15 from OIR that showed the tip for low income. Then when we
16 took the break we were looking at an email exchange from
17 April 28 between Dr. Driver-Linn and Ms. Heenan, and we
18 talked about how at this time you thought it would be
19 worthwhile to share the empirical data that you had on low
20 income.

21 Do you recall that conversation?

22 **A.** I do.

23 **Q.** Okay. And so then Ms. Heenan responds to
24 Dr. Driver-Linn's email. She says, "Sounds good re Fitz."
25 She asks, "What's the issue?"

1 And then briefly on page 1 of 604, we're got
2 Dr. Driver-Linn's response to Christine Heenan. This is now
3 the next day on April 2, 2013. Let me just read this part of
4 Plaintiff's Exhibit 604 and I'll ask you a quick question and
5 we'll move on.

6 "Fitz asked us to do some analysis of the 'thumb on
7 the scale' for low income. Could be a positive message but
8 has implications for need-blind policy as well as opening the
9 door to Unz-like requests for information about other thumbs
10 on the scale. Team is putting together a memo to send to
11 Fitz, copy to you and Jeff, to put this in context, but I
12 guess I am aware that part of the wonderful thing about Fitz
13 is that he has lots of friends and he likes to talk about his
14 work."

15 And I'm sure we can agree with the last part,
16 right?

17 **A.** That would not be unfair.

18 **Q.** Okay. My question here, in all seriousness, Dean
19 Fitzsimmons, is at this time, after you received those
20 low-income slides, you were thinking about sharing them more
21 broadly, were you in conversations with Driver-Linn about
22 potential implications or concerns with sharing that
23 information because it might lead to concerns around the Unz
24 Asian-American discrimination issue?

25 **A.** I guess. I mean, I think that's as good a guess as I

1 could give.

2 **Q.** That's something you recall discussing with her around
3 that time, correct?

4 **A.** Yes.

5 **Q.** And you do -- and we'll look at it in a moment. You do
6 recall ultimately getting a memo dated May 1 from OIR on the
7 low-income issue, correct?

8 **A.** That's correct, yes.

9 **Q.** We're going to look at that in one minute, but I reminded
10 myself over the break we forgot to look at one page of
11 Plaintiff's Exhibit 12. So we'll do that briefly. We'll go
12 back to Plaintiff's Exhibit 12, page 34.

13 We spent a long time -- I've got it on the screen,
14 Dean Fitzsimmons. We spent a long time talking about what
15 these models and these bar graphs show. You recall that,
16 correct?

17 **A.** That's correct.

18 **Q.** We're not going to revisit that discussion. The record
19 is clear. What I wanted to show you was page 38. We looked
20 at page 35 -- actually we skipped 35. We looked at 36 and 37
21 together. I meant to show you, I forgot, page 38. So just a
22 few pages after the model. Page 38, Plaintiff's Exhibit 12.
23 Next steps.

24 **A.** This is P12?

25 **Q.** Yes. I've got it on the screen. You're welcome to get

1 it out from the binder. Just let me know when you're ready.

2 **A.** You're on page 38.

3 **Q.** Right. Of the slide. What OIR is saying on page 38,
4 "Next steps. Addressing questions raised about admissions
5 and financial aid."

6 Do you see that?

7 **A.** I do.

8 **Q.** And then we'll blow up the top of this document, and you
9 see one of the research questions, Question Number 3 is, "Is
10 there bias against Asians in college admissions?"

11 Do you see that?

12 **A.** I do.

13 **Q.** You said you were comfortable with what those bar graphs
14 showed that we talked about for so long. But at least OIR is
15 asking the question, "Is there bias against Asians in college
16 admissions?" That's the question they're asking here,
17 correct?

18 **A.** The question they asked is part of the report, their
19 comprehensive report.

20 **Q.** And then next steps they have on the right, they have,
21 "Who else should see this work?"

22 Do you see that?

23 **A.** I do.

24 **Q.** We've already agreed that this wasn't shared with others
25 in the admissions office or Dean Smith or President Faust,

1 correct, this part of the document, correct?

2 **A.** That's correct.

3 **Q.** Okay. And then it says, "To further address the question
4 of bias, is there more data to elaborate our understanding of
5 the role of the personal essay and other factors?"

6 Do you see that?

7 **A.** I do.

8 **Q.** And there was no follow-up between OIR and the admissions
9 office on the personal essay issue, correct?

10 **A.** That's correct. Of course they are not admission
11 officers and we are, and we know that the personal essay
12 along with every other factor does play a role. So that
13 might have been sort of interesting to them because perhaps
14 they didn't realize what we did with it.

15 **Q.** So they were raising the question, "Is there bias against
16 Asians in college admissions?" But you thought you knew the
17 answer at this time. Is that what you're saying?

18 **A.** Certainly their model and all the other things we looked
19 at suggested that there was no bias.

20 **Q.** Let's go ahead and look at that May 1 memo, which is
21 Plaintiff's Exhibit 26.

22 MR. HUGHES: And before I ask substantive
23 questions, I'd like to offer Plaintiff's Exhibit 26 into
24 evidence.

25 MR. LEE: No objection.

1 THE COURT: Admitted.

2 (Plaintiff Exhibit No. 26 admitted.)

3 BY MR. HUGHES:

4 Q. Thank you, Your Honor. So, Dean Fitzsimmons, I've got
5 the first page of Plaintiff's Exhibit 26 blown up on the
6 screen.

7 Do you see that?

8 A. I do.

9 Q. And you recall receiving this email with the May 1 memo
10 attached to it, correct?

11 A. I do.

12 Q. The email is from Ms. Bever on May 1, addressed to you,
13 correct?

14 A. That's correct.

15 Q. Copying your assistant and Dr. Driver-Linn and Mark
16 Hansen, correct?

17 A. That's correct.

18 Q. Subject, "Admissions memo," and the title of the
19 attachment is "Low-Income Admissions Memo Final," date of
20 May 1, 2013, correct?

21 A. That's correct.

22 Q. This is the final memo from OIR on the low-income
23 admission issue that you asked them to look into, correct?

24 A. It looks like their final draft.

25 Q. And then Ms. Bever writes to you, "Dear Fitz. Attached

1 is a memo describing our recent analysis of low-income
2 admissions. In the memo we describe our approach and
3 results. At your suggestion, we reviewed a small sample of
4 literature to put this in context and realized our approach
5 was consistent with what others have done. We'd appreciate
6 any comments or suggestions you have."

7 I'll stop there. And I'll ask you, do you agree
8 that you suggested to OIR to look into the literature to
9 effectively validate their approach?

10 **A.** That's correct.

11 **Q.** And you agree that OIR did, in fact, do that and they
12 described what they did in the memo, correct?

13 **A.** That's correct.

14 **Q.** And then the next paragraph goes on to say, "We thought
15 based on our conversation last week that it would also make
16 sense to share this with Jeff Neal, Christine Heenan, Nina
17 Collins, and Sally Donahue. Does that make sense?"

18 Do you see that?

19 **A.** I do.

20 **Q.** Do you know whether you ultimately shared this memo with
21 Jeff Neal or Christine Heenan?

22 **A.** I suspect that maybe they shared the memo, but we would
23 certainly be open to having them share that information.

24 **Q.** Again, this is just a few days after the email exchange
25 between Driver-Linn and Heenan on the Unz issue.

1 Were the conversations that Ms. Bever was referring
2 to here conversations about the potential considerations in
3 sharing this low-income information more broadly?

4 **A.** I think so. I'm not quite sure whether she was referring
5 to a conversation she had with me or perhaps with others in
6 her group.

7 **Q.** The email is addressed to you, right?

8 **A.** Yes. But I'm just talking -- I understand what you're
9 saying.

10 **Q.** Okay. So we can go ahead, Dean Fitzsimmons, and look at
11 the memo. This is where the actual attachment, the memo,
12 starts, right?

13 **A.** That's correct.

14 **Q.** Let's walk through parts of it. We're not going to read
15 the whole thing. On the first page, OIR says -- the memo is
16 addressed to you and only to you, correct?

17 **A.** That's correct.

18 **Q.** And OIR says, "At your request, we undertook an analysis
19 to determine if the chance of admission is any different for
20 low-income students, holding all other admissions
21 characteristics constant.

22 "Below we briefly describe the data used for our
23 analysis and its limitations, our approach, and our findings.
24 At the conclusion we outline some issues we believe are
25 important to consider prior to public dissemination of this

1 analysis."

2 That's part of the memo, correct?

3 **A.** That's correct.

4 **Q.** Again done at your request, correct?

5 **A.** That's correct.

6 **Q.** And then if we go to the second page, they describe in
7 the memo the approach and the process that they took,
8 correct, Dean Fitzsimmons?

9 **A.** That's correct.

10 **Q.** And I've got the second page of the memo, which is the
11 third page of Plaintiff's Exhibit 26, up on the screen. And
12 you can see I've highlighted a paragraph where OIR identifies
13 some of the limitations associated with the approach they've
14 taken, correct?

15 **A.** That's correct.

16 **Q.** Do you see that up on the screen?

17 **A.** I do.

18 **Q.** And then OIR goes on to say, "In spite of these
19 limitations, the logistic regression model results are
20 consistent with the descriptive analysis described above and
21 shown in Exhibits 1 and 2. Exhibit 3 illustrates the
22 difference between the predicted admission rate and actual
23 admission rate for students at each income level."

24 Do you see that?

25 **A.** I do.

1 **Q.** They walk through the limitations and they say we
2 compared the output of our model to some descriptive
3 analysis. They match up. That's a measure of reliability.

4 Would you agree?

5 **A.** That's correct.

6 **Q.** So now I want to look at Exhibits 1, 2, and 3. I think
7 they will look familiar. So here is Exhibit 1 to the May 1
8 memo. This was also an exhibit to Plaintiff's Exhibit 21,
9 the slides that you received on April 22 that we looked at
10 earlier. It's the same slide, correct?

11 **A.** Looks identical.

12 **Q.** And Exhibit 2, again, is the same thing we looked at that
13 you got on April 22, correct?

14 **A.** That's correct.

15 **Q.** And Exhibit 3 is, again, the same thing that you got on
16 April 22 in Plaintiff's Exhibit 21, correct?

17 **A.** That's correct.

18 **Q.** And again, this Exhibit 3 actually shows some of the
19 results of the logistic regression model that was performed
20 by OIR, correct?

21 **A.** That's correct.

22 **Q.** You agreed that that logistic regression model provided
23 empirical evidence of that low-income students applying to
24 Harvard were receiving a tip, correct?

25 **A.** That's correct.

1 **Q.** Okay. So now I want to go back to where we were on
2 page 2 of the memo. The first paragraph describes Exhibits 1
3 and 2, agree? That I've got highlighted, culled out?

4 **A.** Yes.

5 **Q.** And then I want to go to the paragraph before, which
6 says, "To get a sense of the size of the admissions advantage
7 conferred to low-income applicants relative to other groups
8 of applicants, the so-called 'thumb on the scale,' we include
9 low-income status in a second logistic regression model. The
10 table below is sorted based on the effect size of each of the
11 variables included in the model. The variables with the
12 largest effects on the probability of admission are athletic
13 rating, personal rating, and legacy status. Compared to
14 athletes and legacies, the side of the advantage for
15 low-income students is relatively small."

16 Do you see that?

17 **A.** I do.

18 **Q.** And you know from looking at this document before that
19 the reports of that logistic regression model are reported --
20 the results of it are reported on the next page, correct?

21 **A.** Yes, and with their -- yes.

22 **Q.** But those results provide more empirical evidence about
23 how Harvard's admissions process works, correct?

24 **A.** It gives you another way to look at it perhaps.

25 **Q.** It builds on the first logistic regression model that was

1 in Slide 3 that we just looked at, right?

2 **A.** Right.

3 **Q.** And it provides more empirical evidence about how the
4 Harvard admissions process works, correct?

5 **A.** Yes. In the sample that they used, yes.

6 **Q.** And then if we go to the third page, the next page, we've
7 got the output of that logistic regression model, correct?

8 **A.** That's correct.

9 THE COURT: What does "constant" mean? Do you know
10 what "constant" means?

11 THE WITNESS: I'm in over my head on this kind of
12 stuff. These are always very hard to gauge, Your Honor.
13 It's probably better to look at the actual chart that they
14 created. But it comes out of, I guess, weightings in the
15 equation. But I'm not quite sure what the "constant" is, to
16 be honest.

17 MR. HUGHES: We'd probably be better have some
18 other experts do that.

19 THE COURT: We'll get it tomorrow. Thank you.

20 BY MR. HUGHES:

21 **Q.** In any event, what OIR has described to you in this memo
22 is that the higher the number here, the greater your chances
23 are of getting into Harvard, correct?

24 **A.** Yes. But it's very hard for a non-statistical expert to
25 figure out actually what these things mean.

1 **Q.** I just want to make sure we read what OIR told you, and
2 I'll highlight it. We just went over this, but again, OIR is
3 telling you that the variable with the largest effects on the
4 probability of admission, and then it describes what those
5 are and then it has the table, correct?

6 **A.** Yes.

7 **Q.** OIR is communicating to you what the basic meaning of
8 these variables and the numbers associated with them are,
9 right?

10 **A.** That's what they're trying to do.

11 **Q.** And then if we go to the next page and we see what OIR
12 told you about the variables that are included, we see the
13 athletic rating of 1, you've got a really good chance of
14 admission to Harvard, correct? Highest number on the list?

15 **A.** I'm not sure that's exactly how to read that. It is a
16 factor that can be very helpful. I think it's probably the
17 way you look at it. Again, I'm not entirely sure what these
18 numbers actually mean, and I would certainly defer to the
19 statistical experts when the time comes.

20 **Q.** So you understood what Table 3 in Plaintiff's Exhibit 21
21 meant which was based on a version of this logistic
22 regression model.

23 Are you saying that you don't understand that OIR
24 is telling you the higher the number here the more likely
25 chance of admission to Harvard?

1 **A.** I think, again, it's what the -- effect the factor would
2 have. But how you calibrate that with a real candidate is a
3 little bit unclear to me and I think to most people probably
4 in the room.

5 But I understand what you're saying. And I think
6 there's no question, for example, that if you have an
7 athletic rating of 1, that would perhaps increase your
8 chances of getting in.

9 **Q.** You would agree that having an athletic rating of 1
10 significantly increases your chances of getting into Harvard,
11 correct?

12 **A.** Yes.

13 **Q.** And you also agree that having a high personal rating
14 also increases your chances of getting into Harvard, correct?

15 **A.** That's correct.

16 **Q.** And you also agree that African-Americans receive a tip
17 in the admissions process. We talked about that yesterday,
18 correct?

19 **A.** That's correct.

20 **Q.** And you also agree that Hispanic applicants, we see down
21 here, also get a tip in the admissions process at Harvard,
22 correct?

23 **A.** That's true.

24 **Q.** Remember we looked at your report, Plaintiff's
25 Exhibit 31, where you adopted Dr. Card's analysis, and it

1 showed as a group African-Americans get more of a tip than
2 Hispanic applicants to Harvard, correct?

3 **A.** Yes.

4 **Q.** And that relative relationship --

5 **A.** At least in terms of the way that worked out in that
6 sample.

7 **Q.** And that relative relationship holds true in this report
8 that you received from --

9 MR. LEE: I'm objecting to this now, having him
10 draw conclusions on this chart. He said repeatedly he's not
11 quite sure how it works. I don't have any problem with him
12 going back to the charts that he testified about, but we're
13 now -- he said four or five times he's not quite sure how
14 these numbers work.

15 MR. HUGHES: Your Honor, he received this memo --

16 THE COURT: I don't understand the question even.

17 MR. HUGHES: I will withdraw that question.

18 THE COURT: All right.

19 BY MR. HUGHES:

20 **Q.** If we look down at the low income here is that
21 self-reported income less than or equal to \$60,000, correct?

22 **A.** That's correct.

23 **Q.** That was the definition of low income in both these
24 regression models, correct?

25 **A.** Yes.

1 Q. And that's positively associated with admission to
2 Harvard, correct?

3 A. That's correct.

4 Q. And what we see down the next --

5 THE COURT: Hold on a second, Mr. Hughes.

6 MR. LEE: Your Honor, I object. The witness who
7 prepared this chart is going to testify. She's on their
8 witness list. She's going to come in. He said a number of
9 times he's not the person to do it.

10 MR. HUGHES: Your Honor, he asked for this
11 analysis. This is just showing the size of the tip for low
12 income.

13 MR. LEE: It's --

14 THE COURT: Stop. I'm going to let him -- he's
15 just going through the information in the chart. So we get
16 down to the Asians so he can comment on that, I assume is the
17 purpose of the exercise. It's not prejudicing you in any
18 way. I'm going to overrule the objection.

19 MR. LEE: Can I say one more thing, Your Honor?

20 THE COURT: Yes.

21 MR. LEE: I understand where Your Honor is going.
22 This doesn't say anything about the tip and how a tip
23 correlates to any of this, which is the last question.

24 THE COURT: All right. He's right about that. So
25 why don't you rephrase it without the word "tip."

1 BY MR. HUGHES:

2 Q. The variable self-reported income less than or equal to
3 \$60,000 is positively associated with admission to Harvard,
4 correct?

5 A. Again, it's not a cause and effect. It would be one
6 factor among many, I think is the way to think about it with
7 anything.

8 Q. You understand this is a refinement of the logistic
9 regression model that you've told me 20 times provided
10 empirical evidence that low-income applicants were getting a
11 tip. You understand that, right?

12 A. I do.

13 Q. Now, the next variable I want to ask you about is Asian,
14 and under Asian the number is negative, correct?

15 A. That's correct.

16 Q. The variable Asian is negatively associated with your
17 chance of getting into Harvard. That's what you were told on
18 May 1, 2013, correct?

19 A. That's -- again, I'm not quite sure what these numbers
20 mean. You have to ask an expert, but I understand the drift
21 of your question.

22 Q. Now, we're just going to March down the same page of
23 Plaintiff's Exhibit 26, this memo that you requested and OIR
24 delivered. I'll read it into the record.

25 "The relative sizes of the admissions advantage

1 conferred on different groups can be seen by looking at the
2 differences in actual admit rates as well. In Exhibit 4, we
3 limit our analysis to students with high academic ratings, 1
4 or 2, and examine the differences between athletes and
5 non-athletes, legacy students and others, Asian students and
6 all other students, and low-income students and all other
7 students.

8 "An athlete that is also an academic 1 or 2 has an
9 admit rate of 83 percent compared against 16 percent for
10 non-athletes with an academic 1 or 2. 55 percent of legacies
11 who are academic 1s and 2s are admitted compared with
12 15 percent of all other academic 1s and 2s. Asian applicants
13 with an academic 1 or 2 are admitted 12 percent of the time
14 compared against an admit rate of 18 percent for non-Asian
15 applicants. By comparison, low-income applicants with an
16 academic 1 or 2 have an admit rate of 24 percent compared
17 against 15 percent for all other applicants."

18 That's what was reported to you in the May 1 memo,
19 correct?

20 **A.** That's correct.

21 **Q.** If we look at Slide 4, this is the bar graph that relates
22 to that paragraph that we just read, correct?

23 **A.** That's correct.

24 **Q.** And on the right-hand side, it shows that Asian-American
25 applicants with an academic 1 or 2 are less likely to get

1 into Harvard than everybody else who has an academic 1 or 2,
2 correct?

3 **A.** Yes.

4 **Q.** And it also shows a low-income tip, correct?

5 **A.** That's correct.

6 **Q.** Okay. Low-income tip that -- I'll withdraw that
7 question.

8 Let's go back to the page we were just looking at.
9 This is the last paragraph of text in the memo that OIR
10 delivered to you on May 1.

11 "Issues to consider before sharing these results
12 publicly. We imagine that sharing any analysis of admission
13 weights will draw attention to the variety of factors that
14 compete with one another in the admissions decision. To
15 state the obvious, with only approximately 2,200 spaces for
16 admitted students per year, implicit trade-offs are made
17 between athletes and non-athletes, legacy admits and those
18 without affiliation, low income, and other students.

19 "We know that many are interested in the analysis
20 of the relative trade-offs. While we find that low-income
21 students clearly receive a tip in the admissions process, our
22 descriptive analysis and regression models also shows the tip
23 for legacies and athletes is larger and there are demographic
24 groups that have negative effects."

25 That's what OIR told you, correct?

1 **A.** That's correct.

2 **Q.** And the only demographic group in the chart above that
3 has a negative effect are Asians, correct?

4 **A.** Yeah. I think that's right. Well, slight difference for
5 unknown and other, but I see your --

6 **Q.** Asians have a negative effect, correct?

7 **A.** Then there's unknown and other that apparently have a
8 slight negative association.

9 **Q.** But no question Asians are included in the demographic
10 groups that have negative effects, correct?

11 **A.** Correct.

12 **Q.** Do you recall once you got this memo discussing with
13 Dr. Driver-Linn, Ms. Bever, Christine Heenan, whether it
14 would be a -- the concerns about sharing the low-income
15 information that you had told me earlier you thought was
16 worth sharing, but the concern on the other hand that it
17 might release information about negative effects on certain
18 demographic groups like Asians?

19 **A.** You know, that, I'm not sure again. I wasn't in their
20 minds, you know, for what set of concerns they might have
21 had.

22 I was interested in something very straightforward,
23 and that was to find out whether or not we actually gave a
24 tip, because many didn't think we did, for people from low-
25 and modest-income backgrounds. And so that's what I wanted.

1 And I think that information was good for us to have in the
2 event that the issue would come up either on the road or in
3 other ways.

4 **Q.** So you asked OIR to look at the issue of whether
5 low-income applicants get a tip. They provided you analysis,
6 including a regression model, that showed a tip, and you
7 thought that was reliable empirical evidence of a tip for
8 low-income applicants, correct?

9 **A.** It certainly -- yes. Yup.

10 **Q.** When OIR refined that regression model and showed a
11 negative effect on Asian-Americans, you didn't tell anyone in
12 the admissions office about that, did you?

13 **A.** I'm not sure frankly exactly what we talked about as we
14 talked about the findings. But again, the focus was a simple
15 one; and that is, whether or not we give a tip for people
16 from low- and moderate-income backgrounds. So that as we
17 were actually out on the road already recruiting for next
18 year at that moment, because we do a lot of traveling, we
19 visit 150 locations across the United States. Every year we
20 do a chunk of those in May. So the idea that at least if
21 someone were to ask, they would have this new information
22 that we could corroborate.

23 **Q.** I'm going to put up page 427 of your deposition, line 14.

24 "QUESTION: Did you share the information about the
25 effect of being Asian in this study with anyone else in the

1 admissions office?

2 "ANSWER: I don't recall sharing that specific
3 finding or other findings."

4 Were you asked that question? Did you give that
5 answer?

6 **A.** I'm sure I did because it's here in the record. But
7 again, I'm not sure exactly, you know, the complexity of the
8 discussion that I eventually had with staff. But the idea
9 was that we had this information about low- and
10 moderate-income students, which was of the whole point of the
11 exercise. But I don't remember when I did that sharing the
12 complexity of apparently some concerns about other tips.

13 **Q.** You did share with your staff the information about
14 low-income tips, correct?

15 **A.** Yes. To be honest, I'm not exactly sure, for example,
16 the date or anything of that sort because we have lots of
17 things going on. But the staff certainly knows that there is
18 a tip.

19 **Q.** But you didn't share the information from this memo about
20 the effect of being Asian with the admissions office,
21 correct?

22 **A.** That would be correct, I think, but I don't honestly
23 remember the complexity of the discussion.

24 **Q.** And you didn't ask -- you did not do anything to follow
25 up on the May 1 memo, correct?

1 **A.** That's not correct.

2 **Q.** Well, the very next question:

3 "Did you do anything to follow up on it?"

4 "ANSWER: No."

5 Did you give that testimony in your deposition?

6 MR. LEE: Your Honor, if you go back to preceding
7 questions, this is a very narrow focus. Not the memo in its
8 entirety.

9 THE COURT: I agree. I agree. That's sustained.

10 BY MR. HUGHES:

11 **Q.** Dean Fitzsimmons, tell us what you did do to follow up on
12 the May 1 memo.

13 **A.** One of the things that, again, the various concerns,
14 including the one your just raised and the Ron Unz article
15 and lots of concern in the world certainly over the past
16 30 years about Asian-American admissions, one of the things
17 that I was concerned about when we looked at the findings
18 that we just went through was that I wanted to make sure that
19 if we give a tip for low-income background that we do it as
20 we do everything else, in an evenhanded manner for students
21 from all ethnic backgrounds.

22 **Q.** So, sir, are you telling me that after you got this May 1
23 memo, you asked OIR to dig into the issue of the effect of
24 being Asian?

25 **A.** Yes. Relative, again, to what we were interested in, and

1 that is the -- at this particular point was low-income and
2 moderate-income applicants.

3 **Q.** You'd seen the negative impact of being Asian in
4 Plaintiff's Exhibit 26, and so you went and you asked OIR to
5 take another look at it. That's your testimony, correct?

6 **A.** That's what we ended up getting, yes.

7 **Q.** And you asked OIR to do that because you wanted them to
8 dig deeper on the effect of being Asian in your process,
9 correct?

10 **A.** That would be the best of my recollection. Again, we are
11 always busy at that time of year. There's lots of things
12 going on, but that's the best of my recollection.

13 **Q.** Same page back up on the screen, starting line 14.

14 "Did you share the information about the effect of
15 being Asian in this study with anyone else in the admissions
16 office?

17 "ANSWER: I don't recall sharing that specific
18 finding or other findings.

19 "QUESTION: Did you do anything to follow up on it?

20 "ANSWER: No.

21 "QUESTION: Did you ask to dig into it and ask OIR
22 to take another look at it?

23 "ANSWER: Not that I recall."

24 Did you give that testimony?

25 **A.** Yes. And I would -- again for that particular thing, no.

1 I was concerned about if we have a tip for low- and
2 moderate-income students, I wanted to make sure that that tip
3 applied to all ethnic groups in the same evenhanded manner.

4 **Q.** So, Dean Fitzsimmons, let's now talk about what you now
5 remember. Let's look at Plaintiff's Exhibit 29.

6 MR. HUGHES: I offer this into evidence.

7 MR. LEE: What number are we?

8 MR. HUGHES: Plaintiff's Exhibit 29.

9 MR. LEE: No objection.

10 THE COURT: Admitted.

11 (Plaintiff Exhibit No. 29 admitted.)

12 BY MR. HUGHES:

13 **Q.** Dean Fitzsimmons, is Plaintiff's Exhibit 29 the result of
14 the follow-up that you say you asked for about whether
15 Asian-Americans receive a low-income tip?

16 **A.** Again, to look at, make sure that it went across all
17 ethnic groups.

18 **Q.** And do you remember -- we'll look at it together in a
19 moment. I just want to test your memory. Do you remember
20 what OIR found?

21 **A.** Is this a memory test?

22 **Q.** No. If you want to look at the document, if you prefer
23 to do that, we'll do that. Would you prefer that?

24 **A.** Yeah. It might be good for the Court.

25 **Q.** So now we need to look at what I believe is the

1 attachment or the link for this email which is Plaintiff's
2 Exhibit 28.

3 And I'll offer that into evidence.

4 MR. LEE: No objection, Your Honor.

5 THE COURT: Admitted.

6 (Plaintiff Exhibit No. 28 admitted.)

7 BY MR. HUGHES:

8 **Q.** Thank you, Your Honor. Is this, Dean Fitzsimmons --
9 looking at the first page here, is this the OIR information
10 that you got as a result of the follow-up that you asked for?

11 **A.** It looks like the beginning of -- it's a draft, but it
12 looks like the beginning of it. Sorry. My Boston accent
13 again. Sorry.

14 **Q.** So now I want to look at page 8 of Plaintiff's
15 Exhibit 28.

16 Do you see that? And I've got it on the screen, if
17 it's easier.

18 **A.** Yeah. It's a little bit easier to read here.

19 **Q.** Here we have the coefficients for logistic regression
20 modeling predicting probability of admissions, classes
21 2009-2016, includes interaction terms for all race/ethnicity
22 and low income. Correct?

23 **A.** That's what it says, yes.

24 **Q.** Actually I want to go back to Plaintiff's Exhibit 29 for
25 one minute and ask you a question.

1 **A.** Should I hold this?

2 **Q.** Just look at the screen Plaintiff's Exhibit 29.

3 **A.** All right. Thank you.

4 **Q.** What precisely did you ask OIR to do? Did you just give
5 them a general request to look at the low income, or did you
6 ask them to interact the variable low income with ethnicity?

7 **A.** Again, I don't remember the conversation exactly. But at
8 first it was just the general, let's see if we give a tip.

9 And I don't remember exactly how I phrased it. It
10 was a long time ago, but I did want to make sure -- we've
11 talked yesterday and the day before about safeguards. We're
12 always trying to be vigilant and always trying to make sure
13 we are treating everybody in an evenhanded way. So I
14 probably phrased it let's just make sure that we're looking
15 at this across -- giving the same kind of tip across all
16 ethnic backgrounds.

17 **Q.** So now we'll go back to where we were, Plaintiff's
18 Exhibit 28, page 8. And we'd read everything down to the
19 parenthetical, "Includes interaction terms for all
20 race/ethnicity and low income."

21 Do you see that?

22 **A.** I do.

23 **Q.** Okay. And we've got three things that are in bold here,
24 correct?

25 **A.** That is correct.

1 **Q.** We've got low income, Asian and low income, and Asian.
2 Correct?

3 **A.** That's correct.

4 **Q.** Can you explain to us what OIR -- actually I withdraw
5 that question.

6 Let's go to the very bottom, the lowest bolded
7 thing. There we have Asian. Do you see that?

8 **A.** I do. Right next to an even stronger thing for
9 African-American and low income.

10 **Q.** I want to ask you about that in a moment. But what we
11 see here for Asian -- so that's Asian and not low income --
12 negative .418 coefficient, a negative chance of getting into
13 Harvard by virtue of being Asian, correct?

14 **A.** That's correct.

15 **Q.** That's actually a lower coefficient, a worse chance of
16 getting into Harvard than we saw in Plaintiff's Exhibit 26
17 where the coefficient was a negative .37, correct?

18 **A.** That's correct. But again, it's very hard for me to do
19 this. This is a very kind of strange statistic that I don't
20 fully understand. But especially if you just look at the
21 African-American low income which has an even greater
22 negative loading, I'm not sure how to interpret that. I
23 really would prefer to have the experts.

24 **Q.** Okay. When you looked at Asian and low income, what was
25 your reaction to that, or did you just not understand?

1 **A.** I don't think I fully understood it because a lot of
2 non-statisticians don't quite know how this stuff works. But
3 if you look at the chart in this, it gives you a pretty clear
4 sense. Obviously -- I guess you're the one asking the
5 questions, but there's another chart here on page --

6 **Q.** I tried to read your mind and put the clarity on the
7 screen.

8 **A.** Oh, you did it. There it is. Thank you.

9 **Q.** Here we've got low income in maroon and then not low
10 income in gray, and we see that everybody gets some kind of a
11 tip for being low income versus not, correct?

12 **A.** That's correct, yup. This is an easier way to understand
13 it.

14 **Q.** I just want to show one last thing here. Again low
15 income here is defined by an income of \$60,000 or less,
16 correct?

17 **A.** That's correct.

18 **Q.** And this, page 4 of Plaintiff's Exhibit 28, has the
19 percentages of the applicant pool for the different
20 ethnicities that fall into that low-income category, correct?

21 **A.** Yes. Yeah, for that group of people they were studying.

22 **Q.** And for Asians, that's 18 percent, correct?

23 **A.** Yes.

24 **Q.** And after this, you didn't do any further follow-up on
25 the Unz issue related to discrimination against

1 Asian-Americans, correct?

2 **A.** We did not directly. Harvard didn't directly do that.

3 **Q.** Okay. And when you got this, did this satisfy you that
4 Unz was wrong and that the negative penalty that we saw in
5 the May 1 memo wasn't a concern? Did this put all your
6 concerns to bed about potential discrimination against
7 Asian-Americans when you got this?

8 **A.** I think we felt reassured that we were treating
9 Asian-Americans in an evenhanded manner, giving of the same
10 kind of tip that we gave for low-income students from all
11 ethnic backgrounds.

12 **Q.** All right. So we've now looked at a number of documents
13 from OIR. We looked at the admissions 2 document which you
14 were less familiar with. We looked at the February 2013
15 presentation that was shown to you at the February 25
16 meeting. We looked at the May 1, 2013, memo that was shown
17 to you.

18 All of those showed information that indicated at
19 least the possibility of disadvantage of being Asian in terms
20 of a chance of getting into Harvard, correct?

21 **A.** Again, I'm not sure I would phrase it that way, but I
22 understand the thrust of your question.

23 **Q.** And you agreed that there's data points in those -- the
24 25th or the February 20 presentation raises concerns of bias.
25 The admissions 2 shows a negative effect for being Asian.

1 The May 1 memo we just looked at shows a negative coefficient
2 for being Asian, gets even lower when we get to the P28,
3 doesn't it?

4 MR. LEE: Your Honor, this is all compound.

5 THE COURT: Sustained.

6 BY MR. HUGHES:

7 Q. Did you ever share any of this information with Director
8 McGrath?

9 A. I'm sorry. Which information?

10 Q. Any of the information OIR supplied to you concerning the
11 effect of being Asian in the admissions process.

12 A. I am sure that she eventually learned, along with others
13 on the staff, about the fact that we in fact do give a tip
14 for people from poor and modest income backgrounds. I don't
15 remember. She and I see each other all the time. Her office
16 is right across from mine, so we share lots of information.
17 It certainly wouldn't have been kept from her. That's for
18 certain.

19 Q. After you got this information from OIR in 2013, you
20 didn't change anything about your admissions process,
21 correct?

22 A. Well, we certainly continued to be vigilant in all the
23 ways I've talked about before and continued -- especially
24 given the climate, legal issues and so on, continued to have
25 the office of the general counsel meet with our staff every

1 year. We certainly continued our strong training program for
2 new people. And we remained especially vigilant in our
3 committee process where the actual decisions were made.

4 **Q.** In response to the May 1 memo, did you make changes to
5 your admissions process?

6 **A.** Not to the fundamental admissions process that we again
7 have had in place for a very, very long time and has been
8 studied in lots of different ways.

9 **Q.** And you didn't seek bias training for your admissions
10 staff, correct?

11 **A.** Again, we certainly had lots of discussion in the staff
12 and the training periods about making sure that every single
13 person regardless of ethnic background was considered fairly
14 and thoroughly.

15 **Q.** You didn't bring somebody in to give bias training, did
16 you?

17 **A.** Not that I recall. But again, remember we've been
18 dealing with this issue for three or four decades.

19 **Q.** You didn't bring in Cornerstone or Dr. Card to analyze
20 your admissions process, correct?

21 **A.** Again, we had OIR, which we thought was very, very good.

22 **Q.** Okay. And you think your reaction to these OIR reports
23 is consistent with your statement you gave me just now, that
24 you are vigilant concerning claims of discrimination,
25 correct?

1 **A.** Yes. I think your word "consistent" is just right
2 because what you saw when we looked at the five, four models
3 in the actual class, that was perfectly consistent with
4 everything we've always said about our admissions process and
5 everything that was said about our process in *Bakke* and
6 coming out of the OCR review.

7 **Q.** And you think it was consistent with vigilance not to
8 send any of this information to anyone else in the admissions
9 office. Do you agree with that?

10 **A.** I'm not sure that's actually true.

11 **Q.** You think that you ultimately sent some of this
12 information to people in the admissions office?

13 **A.** We certainly shared the idea that there is a tip for low-
14 and modest-income-background students which was, I think, a
15 vitally important thing for us to be able to say to a country
16 that is in many ways less and less equal almost every year in
17 terms of economic background.

18 **Q.** Do you think it was consistent with vigilance not to
19 share the information concerning the negative effect on
20 Asian-Americans with the admissions office?

21 **A.** Again, I think the materials that were viewed I think
22 were vetted thoroughly.

23 **Q.** And do you think that it was consistent with the exercise
24 of vigilance after you got this last report from OIR not to
25 ask OIR to do further work on these reports?

1 **A.** Well, they did do some further work, obviously, and they
2 had access to all the information.

3 **Q.** Sir, I'm asking you about the last document we looked at,
4 P28 and P29. Do you think it was consistent with vigilance
5 for you --

6 **A.** I'm sorry. I need to look at that. P28?

7 **Q.** This one. I've got it on the screen. Do you think it
8 was consistent with the exercise of vigilance not to ask OIR
9 to do further work on these reports?

10 **A.** I just want to make sure I've got the right one. Okay,
11 this is the one on ethnicity.

12 I think again page 6 gave us the answer, I think,
13 that we and others who -- you know, who would need the
14 information would have, that we're giving a tip for low- and
15 moderate-income-background students and we're doing it
16 evenhandedly for everyone regardless of ethnicity.

17 **Q.** I'm not focused on the low-income tip.

18 Let me ask you again. Do you think it was
19 consistent with vigilance for any allegation of
20 discrimination against Asian-Americans not to ask the Office
21 of Institutional Research to do further work on these
22 reports?

23 **A.** Yes. I think we considered everything as carefully as we
24 could.

25 MR. HUGHES: No further questions.

1 MR. LEE: Could we have a minute to set up, Your
2 Honor?

3 THE COURT: Yes. Five minutes, ten minutes.

4 MR. LEE: Five minutes and we're ready to go.

5 THE COURT: Fine.

6 (Off the record.)

7 THE COURT: When you're ready, Mr. Lee.

8 CROSS EXAMINATION

9 BY MR. LEE:

10 Q. Good afternoon, Dean Fitzsimmons.

11 A. Good afternoon.

12 Q. You've told us a number of times that the Harvard
13 admissions process is a whole-person process where you
14 consider all the information about the person, correct?

15 A. Correct.

16 Q. To understand the Harvard admissions process, would it be
17 important to understand the entire process and not just parts
18 of it in the same way?

19 A. Absolutely. Beginning to end on each person.

20 Q. And I'm going to take you through the process in detail,
21 but I want to complete the picture on some of the things that
22 Mr. Hughes asked you about for the last six hours or so.

23 There's a notebook before you, and if you would,
24 turn the notebook to Tab 27. Tell me when you're there.

25 A. I have it, I believe.

1 **Q.** Do you have Tab 27 before you?

2 **A.** Is it P88?

3 **Q.** It's P88. It's the interviewer handbook from 2013 to
4 2014.

5 **A.** Yes.

6 **Q.** Mr. Hughes asked you some questions about the guidance
7 provided on the personal rating in the document.

8 Do you recall that?

9 **A.** I do.

10 **Q.** And he blew up on the screen one paragraph and asked if
11 this was all the information about how do you set a personal
12 rating in the guide book.

13 Do you recall that?

14 **A.** I do.

15 **Q.** So let's look at some of the pages that he did not show
16 you. Turn, if you would, to page 38, and tell me when you're
17 there.

18 **A.** I'm there.

19 **Q.** Now, this is a portion of the same book that he put in
20 front of you, correct?

21 **A.** That's correct.

22 **Q.** And in this portion of the book, what do you find?

23 **A.** These are our sample interview reports. And many times
24 alums find these extremely helpful in understanding a bit
25 more of the nuance and the whole-person approach that we

1 have.

2 **Q.** These interview guides go out to how many interviewers?

3 **A.** There are about 10,000.

4 **Q.** And how many admissions officers receive these?

5 **A.** About 40.

6 **Q.** And all 10,000 plus 40 people would receive the sample
7 interview reports in this exhibit, correct?

8 **A.** That's correct. And of course also the trainees as they
9 go through the process as new employees.

10 **Q.** Now, when you were asked questions about how the personal
11 rating is set by Mr. Hughes, and I think I wrote it down
12 correctly, you said there is the other information and
13 training provided.

14 Do you recall that?

15 **A.** I do.

16 **Q.** Now, in this handbook itself, how many sample interview
17 reports are there?

18 **A.** I haven't counted them up yet.

19 **Q.** I can represent to you in the interest of time --

20 **A.** There are quite a few.

21 **Q.** -- there are approximately five. Do you see those?

22 **A.** Yes.

23 **Q.** And for each one of the five, they actually have a
24 section called "Personal Qualities," correct?

25 **A.** That's correct.

1 **Q.** So by way of example if I pick the first interview report
2 on page 38. Do you have that?

3 **A.** I do.

4 **Q.** Tell me when you're there.

5 **A.** Or I will. Let's see. I do.

6 **Q.** If I take you about halfway down the page in the sample
7 interview report, you see a "Personal Qualities" caption?

8 **A.** Yes.

9 **Q.** And a rating, correct?

10 **A.** That's correct.

11 **Q.** And then there are comments below in this sample
12 interview report, correct?

13 **A.** That's correct.

14 **Q.** Now, for each of these five samples, there's a section on
15 personal qualities, correct?

16 **A.** That's correct.

17 **Q.** For each of these five, there is a "Comments" section,
18 correct?

19 **A.** That's correct.

20 **Q.** What is the purpose of the "Comments" section?

21 **A.** It's really to try to critique each one of the sample
22 interviews and to try to let our interviewers know that we
23 need more than a number. In fact, the number is interesting,
24 but the more important thing than the number is the
25 description and the complexity of the description.

1 **Q.** Turn, if you would, to page 46. And let's just take a
2 look at one of the five examples in this same exhibit. Do
3 you have that before you?

4 **A.** I do, yep.

5 **Q.** If you go to the top of the page, page 46, this is for a
6 hypothetical applicant named Wilbur, correct?

7 **A.** That's correct.

8 **Q.** Now, if we could scroll down, is there a section on
9 personal qualities?

10 **A.** There is.

11 **Q.** And just take a minute to read to yourself what is said
12 about the personal qualities.

13 Do you see that?

14 **A.** I do.

15 **Q.** And the ratings that was given is what in this sample?

16 **A.** Is a 4.

17 **Q.** Now, there are comments that indicate why this is the
18 appropriate rating, correct?

19 **A.** That's correct.

20 **Q.** Turn, if you would, to page 47.

21 **A.** I have it.

22 **Q.** And would you tell us in this training document, the
23 document that Mr. Hughes had in front of you, what do the
24 comments tell interviewers and admissions officers about the
25 manner in which you go about assessing personal qualities?

1 **A.** I'll just read, if you wish, just a little bit. But
2 we're trying to let people know what a helpful report is.
3 The fact that that person went through and had so much detail
4 was extremely helpful but also a little bit of a qualifier
5 because the interviewer felt perhaps he hadn't seen Wilbur
6 quite at his best. But I think it did give a vivid picture.

7 And again, this is one factor that we could look at
8 and go back in to see what the rest of the application looked
9 like and see, in a sense, what kind of corroborating evidence
10 there might be for those comments.

11 **Q.** In addition to materials like these materials which are
12 the second half of Mr. Hughes' exhibit, are there case books
13 with case studies at the admissions office?

14 **A.** Yes.

15 **Q.** Are those case books and case studies used to train your
16 admissions officer?

17 **A.** Yes, they are.

18 **Q.** And what kind of information, generally? We're going to
19 have Ms. McGrath talk about them in some detail, but what
20 kind of information do they give about the personal qualities
21 you're looking for and how to use the personal rating?

22 **A.** Well, to go through the cases -- and again it's a real
23 application, probably not everything, but close to
24 everything. We allow the new people -- and we also of course
25 use these with alumnae and alumni. We go out across the

1 country and across the world and do case books with them as
2 well.

3 And we have the leaders of what we call schools and
4 scholarship committees come to Cambridge three times a year,
5 and we will often do case books with them. So it's looking
6 at real people and then the complexity of the real person and
7 then in a sense giving them a clearer sense of what might be
8 helpful to our committee.

9 **Q.** So when Mr. Hughes asked you whether that one paragraph
10 was the only guidance you gave and you said there are other
11 things, did you have in mind the case books?

12 **A.** Among other things, yes.

13 **Q.** Did you have in mind the case studies?

14 **A.** Yes.

15 **Q.** Did you have in mind the training?

16 **A.** Yep.

17 **Q.** Did you have in mind these three-time-a-year visits when
18 people came to get trained?

19 **A.** Yes.

20 **Q.** Now let's go to another topic he talked to you about, and
21 let me see if I can fill in the picture.

22 Do you recall him asking you some questions about
23 search lists?

24 **A.** Yes.

25 **Q.** And to remind Her Honor, what is a search list and what

1 is your purpose in getting a search list?

2 **A.** The search list are the names we buy from the ACT and the
3 College Board. We buy maybe 100,000 -- depends on the
4 year -- names, and these are people who have done well in the
5 PSAT or various other standardized tests, and also people who
6 report high grades, usually an A or A minus.

7 And it's a pretty good start. We send information
8 to these students. And then in these days, we follow up with
9 as many as 40 or 50 electronic communications -- emails,
10 Snapchat, Instagram, you name it -- to try to make sure that
11 they consider Harvard as a place for them over the next four
12 years.

13 **Q.** And approximately, using the search list, how many
14 applicants do you reach out to?

15 **A.** With the search list it varies from year to year, but
16 well in excess of 100,000 usually.

17 **Q.** Now, Mr. Hughes asked you whether for African-American
18 high school students you purchased information for a wider
19 range of scores.

20 Do you remember that?

21 **A.** Yes.

22 **Q.** And he asked you whether for Hispanic students you
23 purchased information for a wider range of scores.

24 Do you recall that?

25 **A.** I do.

1 **Q.** Would you explain to Her Honor why for students for
2 African-American or Hispanics you purchase a wider range of
3 scores?

4 **A.** It really comes down to the economic disadvantage
5 associated, again in general, with both of those ethnic
6 groups. These are students who have less of an opportunity,
7 on average at least, to prepare well and to do well on
8 standardized testing because of the lack of opportunity often
9 in their schools and their communities.

10 **Q.** So you're trying to get a broader cross-section of
11 African-American students?

12 **A.** That's right.

13 MR. HUGHES: Your Honor, I'm going to object to the
14 leading. I'm trying to give some leeway to keep us going.

15 THE COURT: It is leading.

16 MR. LEE: I'm just trying to move us along.

17 BY MR. LEE:

18 **Q.** Let's go to Exhibit P2, which is at Tab 26. Do you
19 recall Mr. Hughes talking to you about this exhibit?

20 **A.** Yes, I do.

21 **Q.** And he asked you about the top half of the page, correct?

22 **A.** That's correct.

23 **Q.** Let me draw your attention to the bottom half of the same
24 page, and you'll see something that says "ACT Search"?

25 **A.** Correct.

1 Q. Do you see that?

2 A. I do.

3 Q. What is the ACT?

4 A. The ACT is a test very much like the SAT, and it's
5 available in all parts of the country, but particularly
6 historically certainly in the Midwest and the sort of heart
7 of the country, in some respects the Sparse Country.

8 Q. In Sparse Country, as you discussed with Mr. Hughes, is
9 the SAT or the PSAT the test most likely to be taken?

10 A. It would be usually more likely to be the ACT.

11 Q. So let's look at what the ranges are for the ACT. Can
12 you tell us what the range is for Asians in the search list
13 request?

14 A. That would be 30 to 32.

15 Q. And what is the range for Sparse Country in the same
16 document?

17 A. 30 to 32.

18 Q. So how does the range for Sparse Country and Asians
19 compare on the exhibit that Mr. Hughes asked you about?

20 A. They're obviously very similar, here obviously identical.

21 Q. Now, for white students, what is the ACT range?

22 A. It would be 33 plus.

23 Q. Let's look at a couple of other documents that deal with
24 the search, with search lists. Would you turn to Tab 25,
25 which is P50.

1 **A.** Tab 25, okay.

2 **Q.** Tab 25 in the notebook before you.

3 **A.** I see. Okay. Sorry.

4 THE COURT: On P2 for a minute, if you can just
5 help me out here. High scorers men, 1380 to 1600, and then
6 high scorers Asian men 1380 to 1600.

7 THE WITNESS: Yes.

8 THE COURT: What's the difference? Why are they
9 listed out separately?

10 THE WITNESS: Simply to get more Asian and more
11 Sparse Country, lower it to 30 for Asians and for Sparse
12 Country because of where the ACT is located.

13 THE COURT: Up on the PSAT.

14 THE WITNESS: On the PSAT? Okay. I'm sorry, Your
15 Honor. What's the question?

16 THE COURT: Do you see on PSAT high scorers men?

17 THE WITNESS: Yes.

18 THE COURT: 1380 to 1600?

19 THE WITNESS: Yes.

20 THE COURT: And then if you go down four lines,
21 high scorers Asian men is the exact same range?

22 THE WITNESS: Yes.

23 THE COURT: Why are Asians broken out separately?
24 Wouldn't they be subsumed in high scorers men?

25 THE WITNESS: Yes. I think it's the way you order

1 them from the College Board. And then you can also -- one of
2 the things, remember we have the undergraduate minority
3 recruitment coordinators. These are students who help us
4 with recruiting, including one of the UMRP groups is the
5 Asian-American student group. It's a very old group. So
6 they'll help us. So it's probably just simply the way they
7 ordered it from the College Board.

8 But you're right; it's identical.

9 BY MR. LEE:

10 **Q.** So let's turn, if we could, to Tab 25. Let me know when
11 you're there.

12 **A.** I have it.

13 **Q.** Do you have P50 in front of you?

14 **A.** I do.

15 **Q.** What is it?

16 **A.** This just gives you a little sense of the early action
17 applicants for the class of 2017.

18 **Q.** Now, let's --

19 MR. LEE: Your Honor, we would offer P50.

20 MR. HUGHES: No objection, Your Honor.

21 THE COURT: Admitted.

22 (Plaintiff Exhibit No. 50 admitted.)

23 BY MR. LEE:

24 **Q.** Now, if we turn to the last page of P50 --

25 **A.** Yes.

1 Q. -- do you have that before you?

2 A. I do.

3 Q. Can you tell us what it is?

4 A. It's a memo to Marlyn and to me from Elizabeth Yong. And
5 she's just describing -- again, it's always complex for
6 whoever is ordering the search because it's -- sometimes
7 there are uneven numbers who take various test
8 administrations. But she's just giving us a sense of what's
9 happening with this year's PSAT search.

10 Q. Now, there is a category of high scorers. Do you see
11 that?

12 A. Yes, I do.

13 Q. What is the range for Sparse Country?

14 A. Sparse Country appears to be 1310 to 1370.

15 Q. Now, there are two Asian levels. Do you see those?

16 A. I do.

17 Q. What is Asian level 1?

18 A. 1380 to 1600.

19 Q. What is Asian level 2?

20 A. 1300 to 1370.

21 Q. And as you move from left to right, is the number of
22 students in each of these categories for 2014 and 2015
23 listed?

24 A. Yes.

25 Q. For 2014 and 2015, was Harvard sending letters to

1 students in Asian level 1 and Asian level 2?

2 **A.** Yes.

3 **Q.** So how does Asian level 2 compare to the high scorers?

4 **A.** You know, it is somewhat lower.

5 **Q.** Now, do the cutoffs that the admissions office uses on a
6 year-to-year basis vary?

7 **A.** I'm sorry?

8 **Q.** I'm sorry. I'll state it again.

9 Do the cutoffs that you use in your search list
10 vary from year to year?

11 **A.** It can, but there's some continuity over time. We don't
12 want to send out too many search letters simply because if
13 you send out too many search letters to people who have less
14 of a chance of getting in, it can actually have a negative
15 effect. First of all, you don't want to turn more people
16 down. And second of all, long term within that high school,
17 it may send a discouraging message in the future. So I think
18 we try to be very realistic with these levels.

19 **Q.** Now, the dates for the columns when there's an Asian
20 level 2, which is lower than high scorers are 2014 and 2015.

21 Do you see that?

22 **A.** Yes, I do.

23 **Q.** And approximately when were you implementing your
24 low-income initiatives across a variety of ethnicities?

25 **A.** The low-income piece of it started in 2003, 2004, right

1 in that range. It was originally 60,000. We have raised the
2 low-income piece to 65, but that's when it started.

3 **Q.** So let me go to a third issue that Mr. Hughes talked to
4 you about and see if I can fill in a blank. Turn, if you
5 would, to Tab 12, which is the OCR findings.

6 **A.** Yes.

7 **Q.** Do you have that before you?

8 **A.** I do.

9 **Q.** And I want to turn you to page 26.

10 MR. HUGHES: Mr. Lee, could we get an exhibit
11 number?

12 MR. LEE: 555.

13 BY MR. LEE:

14 **Q.** Could you tell me when you're there?

15 **A.** I'm there.

16 **Q.** Turn, if you would, to page 26.

17 **A.** 26.

18 **Q.** Do you see the second paragraph on page 26?

19 **A.** I do.

20 **Q.** Now, do you recall yesterday Mr. Hughes asking you some
21 questions about stereotyping?

22 **A.** I do.

23 **Q.** And reading to you a sentence or two from the report that
24 talked to you about stereotyping?

25 **A.** Yes.

1 **Q.** And I think you referred to the findings of OCR. Do you
2 remember that?

3 **A.** I did.

4 **Q.** Would you read to us what OCR found in the second
5 paragraph on page 26.

6 **A.** "OCR found that while some reader comments could be
7 construed to negatively affect the case of Asian-American
8 applicants, the ratings given to the applicant where these
9 comments did occur did not reflect a lower-than-expected
10 score.

11 "For example, in the aforementioned interviewer's
12 comment on 'hard worker' versus the 'outstanding potential
13 scholar,' the reader rated the applicant's academic area a 2,
14 consistent with his test scores and class standing.

15 "Similarly, applicants who were deemed to be
16 'quiet/shy' were often rated 3 or better in the preliminary
17 over all rating."

18 **Q.** And what did OCR conclude in the next paragraph, after
19 having considered these comments and the ratings that
20 resulted in?

21 **A.** "OCR concluded that while descriptions of Asian-American
22 applicants were found that could have implications for the
23 stereotyping of Asian-American students, they could not be
24 shown to have negatively impacted the ratings given to these
25 applicants."

1 **Q.** Now, the fourth area I want to go into before I take you
2 through the admissions process is the whole question of the
3 Unz article and OIR, which Mr. Hughes talked to you about
4 today.

5 Do you have those in mind?

6 **A.** I do.

7 **Q.** Turn, if you would, to -- let's make sure I get the right
8 number tab -- 22.

9 **A.** Okay. I have it.

10 **Q.** Do you have that before you?

11 **A.** I do.

12 **Q.** Did you find P14?

13 **A.** I did.

14 **Q.** First let me ask you this: You were asked several
15 questions about OIR. Is OIR involved in the admissions
16 process as it's implemented and executed at Harvard?

17 **A.** No.

18 **Q.** Does OIR participate in the admissions committee
19 decisions in any way?

20 **A.** No.

21 **Q.** So now if you're at Tab 22, P14, what is P14?

22 THE WITNESS: Your Honor, P14 is a memo from Sally
23 Donahue, our director of financial aid, to me about getting
24 together.

25 MR. LEE: And, Your Honor, we offer P14. It's in.

1 I'm sorry. I think it went in already.

2 Could I just have a second, Your Honor?

3 THE COURT: Yes.

4 BY MR. LEE:

5 Q. So let me now talk to you a little bit about the Unz
6 article that Mr. Hughes talked to you about. Turn in your
7 notebook to Tab 23.

8 A. 23, yes.

9 Q. Do you have that before you?

10 A. I do.

11 Q. What is it?

12 A. It's the article by Ron Unz, the "Myth of American
13 Meritocracy."

14 Q. Now, Mr. Hughes described it as criticizing Harvard's
15 admissions process.

16 Do you recall that?

17 A. I do.

18 Q. Did he say something about more than just Harvard's
19 admissions process?

20 A. Yes. Certainly he was talking well beyond Harvard.

21 Q. Let's see what he said about some other ethnic groups.

22 In PX218, would you turn to page 26?

23 A. I have it.

24 Q. Do you see the -- and I'll bring it up on the screen.

25 Do you see the section that's called "The Strange

1 Collapse of Jewish Academic Achievement"?

2 **A.** I do.

3 **Q.** Turn, if you would, to the next page, and I'm going to
4 ask you to go to the right hand column.

5 Do you see the sentence that begins "This pattern"?

6 **A.** "This pattern"? Yes, I do.

7 **Q.** Would you read that sentence for us, please.

8 **A.** "This pattern of third- or fourth-generation American
9 students lacking the academic drive or intensity of their
10 forefathers is hardly surprising, nor unique to Jews.

11 Consider the case of Japanese-Americans who mostly arrived in
12 America during roughly the same era. America's Japanese" --

13 **Q.** I'll stop you there because the exhibit is in. Let's see
14 what he had to say about some of these ethnic groups. Turn,
15 if you would, to the next page, page 28.

16 **A.** Okay.

17 **Q.** And look at the bottom of the left-hand column of
18 page 28.

19 **A.** Yes.

20 **Q.** Do you see the sentence that begins "We should"?

21 **A.** How far down are you?

22 **Q.** The bottom.

23 **A.** Okay. Yes.

24 **Q.** "We should also remember that Jewish intellectual
25 performance tends to be quite skewed," and then it goes on?

1 **A.** Yes.

2 **Q.** Do you recall when you read the Unz article in 2012
3 considering the comments about ethnic groups other than
4 Asian-Americans?

5 **A.** Yes.

6 **Q.** Was there any controversy about Mr. Unz's comments about
7 groups other than Asian-Americans?

8 **A.** I think many of us thought it was profoundly
9 anti-Semitic.

10 **Q.** You were asked about this flurry of phone calls that you
11 received when the article came out. Were some of them from
12 Jewish alumni at Harvard?

13 **A.** That's correct.

14 **Q.** Were they concerned about the anti-Semitic nature of the
15 article?

16 **A.** Very much so.

17 **Q.** Let's turn to the next page, bottoms of page 29. Do you
18 see the last sentence that says "Meanwhile"?

19 **A.** The last sentence on the left-hand column, yes.

20 **Q.** Now, would you read the sentence that says "Meanwhile"?
21 It goes up until the top of the next column.

22 **A.** "Meanwhile, blacks are substantially out numbered by
23 Hispanics, and they have much weaker academic performance, so
24 they would produce far fewer very high-scoring students.
25 Therefore, we can approximate the number of whites by merely

1 subtracting the number of Asian and Hispanic names as well as
2 an estimated black total based on the latter figure and then
3 determine the number of white gentiles by also subtracting
4 the Jewish total."

5 **Q.** Now, Dean Fitzsimmons, in December of 2012 when this
6 article was published, what was your personal reaction to the
7 article?

8 **A.** My personal reaction was that it was profoundly
9 anti-Semitic and inaccurate and stereotyping and had lots of
10 logical lapses.

11 **Q.** At or about the same time, was there a publication by
12 Professors Hoxby and Avery?

13 **A.** That's correct.

14 **Q.** What was the thesis of the Hoxby-Avery publication?

15 **A.** The thesis was that colleges needed to do more to reach
16 out to students from modest and poor economic backgrounds,
17 especially those who come from what they called one-off
18 schools, schools that rarely would send people out of state,
19 say, to a regional or a national institution.

20 **Q.** So now let's go back to the OIR analysis in February
21 of 2014.

22 THE COURT: Mr. Lee, P218 at Tab 23, the article
23 you've just been discussing, it's not admitted. Did you
24 intend to admit it?

25 MR. LEE: Actually I thought it was. I apologize.

1 We offer it.

2 MR. HUGHES: We don't object, Your Honor.

3 THE COURT: It's admitted.

4 (Plaintiff Exhibit No. 218 admitted.)

5 BY MR. LEE:

6 Q. Would you turn back to Tab 22 in your notebook, which is
7 P14.

8 A. Yes.

9 Q. Just to anchor us, what is the date of the email chain
10 between you, Ms. Driver-Linn, and some others?

11 A. February 20.

12 Q. In the middle of the page, literally right in the middle,
13 and I'll ask Mr. Lee to highlight it, there's reference to a
14 meeting on the 25th of February at 2:00 p.m.

15 Do you see that?

16 A. I do.

17 Q. Did such a meeting occur?

18 A. Yes, I believe.

19 Q. Now, I want to ask you some questions about the
20 presentation that was made to you at that meeting. First
21 turn, if you would, to Tab 17, which is P12.

22 A. Yes.

23 Q. Do you have that before you?

24 A. Yes.

25 Q. Is this the document that was presented to you in

1 February of 2013?

2 **A.** Yes.

3 **Q.** Now, I want to ask you a couple of questions about P9,
4 which is not yet in evidence, but Mr. Hughes asked you about
5 it. So turn back to Tab 16. Did you find P9?

6 **A.** I do, P9, yes.

7 **Q.** What is the date on this document?

8 **A.** February 14, 2012.

9 **Q.** What was the date of your meeting with OIR?

10 **A.** It was February 25, I guess, 2013.

11 **Q.** And the date of P12, I'm not going to have you flip back,
12 is February 2013, correct?

13 **A.** Yes.

14 **Q.** Okay. Now, you told Mr. Hughes that you recall seeing
15 some of the information that's in P12?

16 **A.** Yes, I did.

17 **Q.** I'm sorry. Withdrawn.

18 You saw some of the information that was in P9,
19 correct?

20 **A.** Yes. Yes.

21 **Q.** With P9 in front of you, can you tell Her Honor what
22 portion of P9 you recall seeing in some form in some
23 presentation? Do you have P9 before you?

24 **A.** I do.

25 **Q.** And you can flip through the pages, if it would help.

1 **A.** Yes. Let me do that. Let me pull this up.

2 **Q.** It's at Tab 15, Dean Fitzsimmons.

3 **A.** I have it. You want me to flip through and --

4 **Q.** Just flip through and tell Her Honor which pages you
5 recall seeing.

6 **A.** Well, the one I know I recall really was the one on
7 page 11.

8 **Q.** Could we have page 11 from P9 on the screen.

9 This is the four models plus actuals that you
10 discussed with Mr. Hughes, correct?

11 **A.** That's correct.

12 **Q.** All right. Now, let's turn back to P12 at Tab 17.

13 **A.** Okay.

14 **Q.** Turn, if you would, to page 5.

15 **A.** Page 5.

16 **Q.** What are the subjects that are being considered in the
17 presentation that was actually made to you?

18 **A.** This is the statement of findings.

19 **Q.** I'm sorry. I'm on page 5. Do you see contents?

20 **A.** I'm sorry. Which one are we on?

21 **Q.** Page 5 of P12 at Tab 17.

22 **A.** P12. What tab is that?

23 **Q.** Tab 17.

24 **A.** Tab 17, okay.

25 **Q.** I've been having you jump back and forth. We'll stay

1 now.

2 **A.** Okay. So my assignment is to go through and --

3 **Q.** No, no. No assignment quite yet.

4 Do you see the title of this page, which is
5 "Contents"?

6 **A.** Yes.

7 **Q.** What is the first question posed?

8 **A.** "A first look at the return of early action."

9 **Q.** And would you explain to Her Honor why you were looking
10 at the return of early action at this point in time?

11 **A.** Well, we had given up early action for four classes. And
12 we made the decision on our own, hoping that others would
13 join us. We were only joined, as it turned out, in terms of
14 some of our colleagues, as it were, by Princeton and then
15 University of Virginia. But we were hoping that more
16 institutions would think about giving up early action for a
17 whole variety of different reasons.

18 **Q.** And what decision did you make, did Harvard make, on
19 early action?

20 **A.** Well, we had -- we always -- we did not have binding
21 early decision. It was not binding if you get into Harvard,
22 never has been. It was if you got in, you were free to apply
23 elsewhere.

24 But we did make that decision. We gave it up for
25 four years, but then we felt that we really needed -- had to

1 go back.

2 **Q.** Now, the second question is a shift in gender balance.
3 Briefly, what was that issue at the time?

4 **A.** It really had to do with the founding of the new School
5 of Engineering and Applied Science. And that ended up
6 attracting lots of new applicants, which was terrific. But
7 the downside was that a large percentage of them were men,
8 overwhelmingly really in some of the areas.

9 So we wanted to look at that to see what was
10 actually going on.

11 **Q.** And the third category you discussed with Mr. Hughes, and
12 that portion of the presentation begins on page 31, correct?

13 **A.** That's correct.

14 **Q.** So let's turn back to page 31 to this portion of the
15 presentation. "Evaluating factors that play a role in
16 Harvard College admission."

17 **A.** That's great. I'll go along with the screen here.

18 **Q.** If you turn to page 32, Mr. Hughes asked you about the
19 goal of analysis.

20 Do you recall that?

21 **A.** I do.

22 **Q.** He asked you about the strategy. Do you recall that?

23 **A.** I do.

24 **Q.** And he asked you about the notes, correct?

25 **A.** That's correct.

1 **Q.** I'm not going to repeat any of that, but I want to ask
2 you this: There's a reference to the academic index, and
3 Mr. Hughes asked you about the academic index?

4 **A.** Yes.

5 **Q.** What use does the admissions committee make of the
6 academic index in its admissions decision making?

7 **A.** The only use, really, is for reporting purposes to the
8 Ivy Athletic League literally.

9 **Q.** Is the academic index the same thing as the academic
10 rating?

11 **A.** No, not at all.

12 **Q.** Turn, if you would, to page 33. On page 33, you see the
13 list of the four models, correct?

14 **A.** Yes.

15 **Q.** And Mr. Hughes asked you about these in detail, so I'm
16 not going to ask you about them again except this: The
17 academic model is based upon the academic index and the
18 academic rating, correct?

19 **A.** That's correct.

20 **Q.** Now turn, if you would, to Slide 34. Do you have that
21 before you?

22 **A.** I do.

23 **Q.** And he asked you about that in some detail, correct?

24 **A.** He did.

25 **Q.** Now I'd like to ask about your reaction and your

1 understanding of these models when you first saw it in 2013.
2 Do you have that in mind?

3 **A.** I do.

4 **Q.** First, do you recall seeing these results in February
5 of 2013?

6 **A.** I do.

7 **Q.** Did you see the four models plus the actual?

8 **A.** Yes. I saw the four models.

9 **Q.** And what was your reaction to the information provided in
10 the four models plus the actuals?

11 **A.** Very much as I responded to Mr. Hughes. And that is that
12 there are -- these are some of the factors certainly that go
13 into our admissions process. It's never been test scores and
14 grades alone, you know, going all the way back to the *Bakke*
15 decision.

16 It's interesting, you know, with a small number of
17 factors to see at the end after Model 4 that it was very
18 close to the class size -- to what was actually true in the
19 class itself. So it was certainly perfectly consistent,
20 nothing new, perfectly consistent with everything we'd known
21 before.

22 **Q.** Now I just want to ask you a couple of questions, not to
23 go over ground that Mr. Hughes covered with you, but let me
24 focus you just for a second on Model 1.

25 Model 1 suggested if you just went on the academic

1 index and academic rating, you would have more
2 Asian-Americans in the class, correct?

3 **A.** That's correct.

4 **Q.** Have you ever doubted that?

5 **A.** No. That was certainly part of everything we've talked
6 about, Susie and I, and the OCR report. And again just going
7 back even to the appendix in the *Bakke* decision, it was
8 always the case that Harvard was never simply about looking
9 at somebody's test scores and grades only.

10 **Q.** And of the four models, which is the model that actually
11 takes into account the most factors?

12 **A.** Well, Model 4.

13 **Q.** If we flip back a page, how many factors does Model 4
14 take into account?

15 **A.** It really takes into account eight. Really seven, if you
16 think about it, because it has academic as 1. But let's say
17 seven or eight factors.

18 **Q.** Is this a comprehensive list of the factors used in
19 Harvard's admissions process?

20 **A.** Not in the real world of actually doing admissions at
21 all. Because in there, you're really looking at every single
22 human talent.

23 **Q.** Go back to Slide 34. When you saw these results, I think
24 you told Mr. Hughes they were consistent with what you had
25 understood before, correct?

1 **A.** That's correct.

2 **Q.** In what way were the results consistent?

3 **A.** Well, in the sense that you ended up with -- they came
4 fairly close to the shares in the actual class itself. So
5 that's a pretty good start. But of course the reality is
6 it's much more complicated than this.

7 MR. LEE: So if we could, Mr. Lee, could we blow up
8 the statistics on Model 4 and actual so we could all see a
9 little bit better? If you could, just blow up the numbers at
10 the bottom.

11 BY MR. LEE:

12 **Q.** When you said to Mr. Hughes that the numbers were pretty
13 close to the admitted class, were these numbers the numbers
14 you were referring to?

15 **A.** Absolutely.

16 **Q.** Turn, if you would, to Slide 36 in the same exhibit.

17 **A.** I have it.

18 **Q.** And the title of the slide is?

19 **A.** "What Have We Learned?"

20 **Q.** And what is the first bullet of what we have learned?

21 **A.** "Once we account for ratings and demographic factors, we
22 can closely predict what the admitted class will look like."

23 **Q.** Now, this is what OIR said, correct?

24 **A.** That's correct.

25 **Q.** Was this consistent or inconsistent with your reactions

1 to the models?

2 **A.** Consistent.

3 **Q.** Was this consistent or inconsistent with what you
4 understood to have been the result of the Harvard admissions
5 process over the years?

6 **A.** Very consistent.

7 **Q.** Was it consistent or inconsistent with your experience as
8 an admissions officer?

9 **A.** Very consistent.

10 **Q.** Let's look at the second bullet point on what we have
11 learned. Would you read that to us.

12 **A.** "With current data, we explain a significant amount of
13 the variation in admission, but further details especially
14 around the personal rating may provide further insight."

15 **Q.** And the next bullet point, would you read that to us.

16 **A.** Yes. "There are a variety of factors that quantitative
17 data is likely to miss or ratings do not capture. We'd like
18 to better understand exceptional talent; for example, in
19 unusual music, art, and writing, the role of context cases,
20 the role of the personal statement and essay, and then
21 measures of socioeconomic status, the HFAI" -- that's the
22 Harvard financial aid initiative active flag -- "and the
23 low-income flag."

24 **Q.** Would you explain to Her Honor what the HFAI flag and the
25 low income flag are?

1 **A.** The HFAI flag is when a reader is going through an
2 application, the reader would try to indicate whether or not
3 that person would be eligible for the lowest-income
4 scholarship. So, for example, \$60,000 and under or \$65,000
5 and under now.

6 The low-income flag is very similar. It's the
7 whole idea of trying to make sure that we are, at least as we
8 open up the application and do the preliminary stuff, that if
9 we think there's something going on with either HFAI or the
10 low-income flag, we want it to be noticed.

11 THE COURT: Excuse me. Context cases?

12 THE WITNESS: Context cases are a little more
13 complicated. Just to give you an example, suppose you found
14 a wonderful low-income student who had all kinds of great
15 things, you know, in the application beyond obviously just
16 simply the fact the person is low income. Could be a very
17 attractive applicant of all kinds, of any kind, that might be
18 well down in the class.

19 Because sometimes, say, for example -- I'll speak
20 personally as a person from a low-income background who had,
21 shall we say, a very unsuccessful first ninth grade. You can
22 tell how unsuccessful that was.

23 So sometimes you'll have somebody who has done not
24 quite as well perhaps for economic reasons or other reasons
25 early in high school who then picks up speed and does

1 extraordinarily well. And we might just say this is great.
2 We really want to have this person.

3 There might, on the other hand, at the same school
4 be another very attractive applicant who may be very
5 different, but you might want to go in and consider --
6 remember we're trying to create relationships with schools.
7 You know the old Tip O'Neill, all politics is local, as they
8 say, and we're trying to create 100-year relationships with
9 them.

10 So when we go in and take somebody out of the --
11 lower in the class or down further in the class and we've got
12 some other very attractive people at the upper end of the
13 class, sometimes you can make an argument to take them both
14 because they're both terrific, they both look as though they
15 would be great at Harvard. And it's also a very good message
16 to that school that you may be trying to develop that you're
17 looking for all kinds of different people.

18 But that's one example. Does that suffice or more
19 confusing?

20 THE COURT: I got it.

21 BY MR. LEE:

22 **Q.** The factors that are listed by OIR that are not likely to
23 be included in its analysis, are these the only other factors
24 that the admissions process considers?

25 **A.** No. No, there are so many others. Back in the real

1 world, you know, every time you open up an application, there
2 are all kinds of reasons why you might want to do it. We
3 talk about Sparse Country, for example. You might make an
4 argument, say if you're covering Montana, that this is a
5 great state, you would like to get somebody from there.

6 But we also -- not as well known is that we -- a
7 real geographic tip we give are for Cambridge and Boston
8 students and for Massachusetts generally because we want to
9 do what we can to educate future leaders from our home
10 community. But there's so many other factors.

11 **Q.** Now, at this February 25, 2013, meeting, did anyone at
12 OIR report to you that they had uncovered discrimination or
13 bias against Asian-Americans?

14 **A.** Not at all.

15 **Q.** Did anybody tell you that this presentation showed
16 discrimination or bias against Asian-Americans?

17 **A.** Not at all.

18 **Q.** If they had, would you have remembered?

19 **A.** I think so.

20 **Q.** And would you have done something about it?

21 **A.** Yes.

22 **Q.** Now, in the month or two that followed, you did ask OIR
23 to do another analysis for you, as you told Mr. Hughes,
24 correct?

25 **A.** That's correct.

1 Q. And that was on what issue?

2 A. On low-income students.

3 Q. Turn, if you would, to Tab 18.

4 A. Tab?

5 Q. Tab 18. I apologize.

6 A. 18. Okay.

7 Q. Do you find P26?

8 A. I do.

9 Q. Can you tell us what this is?

10 A. This is a memo from Erica Bever, who was working then at
11 OIR, to me regarding low-income issues.

12 Q. And Mr. Hughes discussed this with you a little bit.
13 What was the bottom line on Ms. Bever's analysis in response
14 to your question, are we giving low-income applicants a tip?

15 A. That we are, would be the bottom line.

16 Q. And after you received this report, did you ask OIR to do
17 any additional analysis?

18 A. I did.

19 Q. On what subject?

20 A. On the subject of the low-income tip across ethnic
21 groups.

22 Q. Mr. Hughes asked you some questions about that, too. So
23 I'm going to take you to Tab 20, which is P29. Do you have
24 that?

25 A. Tab 20, yes, I do, P29.

1 Q. Do you recall receiving that?

2 A. I do.

3 Q. This was a follow-up to your conversation on low-income
4 applicants in admissions, correct?

5 A. That's correct.

6 Q. And if you would, turn to the third bullet.

7 A. Yes. "Across all race/ethnicity groups, low-income
8 students are admitted at a higher rate."

9 Q. Was this a question you specifically asked of her?

10 A. Yes.

11 Q. Turn to Tab 21, which is P28.

12 A. Yes.

13 Q. Do you have those before you?

14 A. I do.

15 Q. Mr. Hughes discussed this with you. Turn to page 6,
16 which is the chart.

17 A. Okay, yes.

18 Q. Did OIR specifically consider Asian-American applicants?

19 A. Yes, they did.

20 Q. What were the results of OIR's analysis on Asian --
21 low-income Asian-American applicants?

22 A. That low-income Asian-Americans were admitted at a
23 10 percent rate while other above \$60,000 income were
24 admitted at 7 percent rate.

25 Q. How did the incremental tip, how did the higher admission

1 rate for Asians compare to the tip or the higher admission
2 rate given to any other ethnicity?

3 **A.** It was certainly among the highest. The Native American
4 difference was slightly greater. That's a very, very small
5 number in terms of individuals, so that can fluctuate quite a
6 bit.

7 **Q.** So among the different ethnicities, the tip or the
8 benefit given to Asian-Americans, low-income Asian-Americans,
9 was among the highest given, correct?

10 **A.** That's correct.

11 **Q.** Now, what was your reaction to this chart when you
12 received it?

13 **A.** I think this is the information that I wanted. Because
14 again, we want to make sure that any criterion, any factor at
15 that might affect admissions would be administered in an
16 evenhanded way across ethnic groups.

17 **Q.** Now, Mr. Hughes asked you some questions about the
18 information you received based upon OIR's models, the models
19 you recall seeing.

20 Do you recall those?

21 **A.** Yes.

22 **Q.** He asked you whether you reported that information to
23 President Faust, to Dean Smith, or to Dean Khurana.

24 Do you recall that?

25 **A.** I do.

1 Q. Based upon those models, was there anything to report?

2 A. There was absolutely nothing to report.

3 Q. Why?

4 A. Everything was absolutely consistent with everything else
5 we already knew. And literally, even that very preliminary
6 incomplete model came up with, you know, by the time they get
7 through with the fourth model, it was really almost identical
8 with the actual class. No news, nothing to report.

9 Q. Let me take you back to the beginning here and walk
10 through the admissions process in a little bit of a
11 disciplined way than I have so far.

12 Dean Fitzsimmons, where did you go to high school?

13 A. Archbishop Williams in Braintree, Massachusetts.

14 Q. The what did your parents do for a living?

15 A. We all ran a gas station and a mom-and-pop store in
16 Weymouth.

17 Q. Did your parents attend college?

18 A. They did not.

19 Q. Were you the first in your family to attend college?

20 A. All four of us were the first in our generation to attend
21 college.

22 Q. Where did you attend college?

23 A. Harvard College, fully accredited in Cambridge.

24 Q. I hope so. What year --

25 A. 1967.

1 Q. What year did you graduate?

2 A. 1967.

3 Q. How did you finance your education at Harvard?

4 A. Two ways. Almost entirely with Harvard's scholarship
5 funding because our family was expected to pay virtually
6 nothing. And the other thing is that I worked term time and
7 summers as dorm crew, research, all kinds of different jobs.
8 And I -- like many low-income students, I actually paid my
9 parents' contribution because they couldn't afford it.

10 Q. And how much was the parental contribution for you back
11 then?

12 A. It's hard to remember exactly. I would say maybe a
13 couple of hundred dollars.

14 Q. Now, did your experience as a first-generation financial
15 aid student influence or educate your views on financial aid
16 as you became involved in the Harvard admissions process?

17 A. Absolutely. It totally transformed my life. It opened
18 up possibilities I had no idea -- you know, growing up in
19 Weymouth, I had never even seen Harvard until my senior year
20 in high school.

21 Q. Now, were you involved in activities while you were in
22 college?

23 A. I was.

24 Q. What activities were you involved in?

25 A. With ice hockey, with the Catholic Students Association,

1 and with the thing called Phillips Brooks, which is sort of
2 an organization that does community service, social service.

3 **Q.** What was the composition, the demographic composition of
4 the Harvard-Radcliffe classes when you were there?

5 **A.** It was something out of generations ago. It was 4 to 1
6 male to female. And of course my high school had been
7 60 percent female, so I thought that was really strange,
8 quite frankly. There were almost no students of color.
9 There were almost no international students. There were
10 extremely few first-generation students. Only about probably
11 a quarter of our class was on financial aid of any kind. It
12 was a totally different world.

13 **Q.** What did you do after you graduated?

14 **A.** I went to the graduate school of education and got a
15 master's and a doctorate.

16 **Q.** Now, what did you do after that?

17 **A.** While in grad school, I was a freshman proctor in the
18 Harvard Yard, and I also taught at Holy Cross college in
19 Worcester part-time and then one year full-time right after I
20 got the doctorate and then came to work at Harvard admissions
21 in 1972.

22 **Q.** How long have you worked at Harvard?

23 **A.** Whatever that difference is, 48 years.

24 **Q.** Since 1972?

25 **A.** 46 years, yeah.

1 **Q.** What year did you become dean of admissions at Harvard?

2 **A.** In 1986.

3 **Q.** Have you held that position continuously since that time?

4 **A.** I have.

5 **Q.** I don't think you've been asked this yet, so I will.

6 Would you explain to Her Honor what are your duties
7 and responsibilities of dean of admissions?

8 **A.** I'll make it quick. So including number one, you've
9 heard all the various ways we recruit.

10 It is worth mentioning, though, that it is quite an
11 amazing outreach. And we travel with Georgetown, Penn, Duke,
12 and Stanford to 120 locations in the United States every
13 year, doing evening meetings and then counselor breakfasts in
14 the morning. And then travel to another 20 or so cities with
15 UVA and Princeton, who became our partners after they gave up
16 early admissions. Then I asked Wellesley and Yale to come
17 with us in that group. So there's another 20 cities there.
18 And then we do additional outreach with other colleges.
19 Probably brings it up -- and sometimes by ourselves to about
20 150 or 160 locations just in the U.S. So a lot of
21 recruiting.

22 **Q.** I'm going to come back to the recruiting just a little
23 bit. We've talked about some of it. The search lists are
24 part of recruiting. Is that correct?

25 **A.** That's correct.

1 Q. The joint visits are part of recruiting?

2 A. Students, everything.

3 Q. Let me ask you first how many employees are in the
4 admissions office?

5 A. Total of about 70, I would say.

6 Q. How many admissions officers are there?

7 A. About 40.

8 Q. How many admissions officers are actually involved in
9 reviewing applications?

10 A. About 40.

11 Q. How many admissions officers vote or participate in every
12 admissions decision every admissions year?

13 A. Every single one of the 40.

14 MR. LEE: Your honor, if this is a good time to
15 take a brief break, we can take it.

16 THE COURT: That's fine. I'm good to go. I'm also
17 happy to take a break. We moved everything to quarter of
18 4:00. We're good to go to quarter of 4:00. If you want to
19 take a break, that's fine. How long? Ten minutes.

20 MR. LEE: Ten minutes is great.

21 THE COURT: Ten minute break.

22 (Court recessed at 2:40 p.m.)

23 THE COURT: When you're ready.

24 BY MR. LEE:

25 Q. Dean Fitzsimmons, I'd like to take you through the

1 admissions process in some detail so we can understand it.

2 MR. LEE: Could I have on the screen DD 1.2,
3 Demonstrative 1.2? Do you see the slide entitled "Objective
4 of" --

5 THE COURT: Where is this? Where do I find it? Is
6 it a demonstrative?

7 MR. LEE: It's just a demonstrative. I think Your
8 Honor has them. Tab 2, Your Honor.

9 BY MR. LEE:

10 Q. Are you with us, Dean Fitzsimmons?

11 A. I am.

12 Q. Would you take us briefly through each of the three
13 objectives that are on DD 1.2?

14 A. Well, ever so briefly. So a little over 42,000
15 applicants, and we're going to admit about 2,000 people, so
16 truly exceptional students are -- who knows exactly how many.
17 But there might only be two or 300 admitted in every class
18 that would be truly unusual.

19 So these would be people who not only have terrific
20 test scores and grades and all those kinds of things --
21 because lots of people have them. They'd be people who had
22 truly exceptional recommendations, let's say from not just
23 their teachers but perhaps from people they'd worked with in
24 the summer or say national or international competitions.

25 They also very often would have had a faculty

1 reading, expertise reading from one of our faculty members on
2 whatever it is. That's a rough idea of who is truly
3 exceptional.

4 **Q.** And are you also looking for students who are exceptional
5 in ways other than academically?

6 **A.** Yes. Really in every way that one could imagine,
7 actually. And we're looking -- I think the whole idea of
8 having a great educational environment and having people who
9 truly will educate each other and inspire each other we
10 actually hope over the four years, that diversity really
11 matters. And it's diversity in all its forms, not just
12 simply ethnic diversity or economic diversity. Religious
13 diversity, you name it. The more diverse the students are,
14 the richer the education.

15 **Q.** You've gone to the second objective.

16 **A.** Yes.

17 **Q.** I think you've hit on some, but what are the types of
18 diversity that you're looking for in a Harvard College class?

19 **A.** It really would go right down the line. The easy ones
20 we've talked a lot about would be ethnic diversity and
21 economic diversity. But we're also looking -- and to some
22 extent certainly geographic diversity, things -- very
23 standard things that people think about.

24 But it's much more than that. It's diversity of
25 thinking. It's diversity of academic interests. I think one

1 of the things we hope with all of our new students who are
2 coming into the School of Engineering and Applied Science is
3 we want them to live with and learn from humanities students
4 and social science students and maybe take some of those
5 courses themselves.

6 So it's diversity in every possible way you can
7 think of it.

8 **Q.** What is the third objective?

9 **A.** Very simple. No more students than beds. We have
10 typically a 97, 98 percent graduation rate for all of our
11 students. And all of our freshmen are required to live in
12 the dorms, and about 98 percent of all of our students live
13 in the dorms. We simply cannot -- we don't have room for
14 more than 1,660 people roughly in each class.

15 **Q.** Approximately how many applications does Harvard receive
16 in a year?

17 **A.** A little over 40,000 in recent years.

18 **Q.** Of that approximately 40,000, how many are academically
19 qualified to do the work at Harvard?

20 **A.** A majority, I would say, perhaps a substantial majority
21 of the people who apply. Because they're very self-selecting
22 in some ways, despite all of our recruiting. A very large
23 percentage could do the work at Harvard.

24 **Q.** To prepare yourself to testify, did you review some
25 information about the Harvard class of 2019?

1 **A.** Yes.

2 **Q.** Approximately how many applications did you receive for
3 the Harvard class of 2019?

4 **A.** It was probably around 35,000.

5 **Q.** Could I have on the Exhibit DD 1.3.

6 MR. LEE: This is a demonstrative, Your Honor,
7 which I think is the next slide in Tab 2.

8 BY MR. LEE:

9 **Q.** Do you have DD 1.3 before you?

10 **A.** I do.

11 **Q.** Is this a chart with some of the information you obtained
12 for your testimony?

13 **A.** Yes.

14 **Q.** For the class of 2019, how many domestic applicants had
15 perfect scores on the verbal section of the SAT?

16 **A.** About 2,700.

17 **Q.** How many had perfect scores on the math section of the
18 SAT?

19 **A.** About 3,400.

20 **Q.** Approximately how many had perfect grade point averages?

21 **A.** A little over 8,000.

22 **Q.** How many students did you admit to the Harvard class of
23 2019?

24 **A.** Sent out about 2,000 admissions tickets.

25 **Q.** Is the number 2,000 a typical number?

1 **A.** It's typical.

2 **Q.** Why is the number 2,000 a typical number?

3 **A.** Simply because we have a pretty good sense, based on whom
4 we've admitted that year, how many of them are likely to show
5 up because there are so many great places out there beyond
6 Harvard. Some of the students, you know, will look at it and
7 decide they want to go to the great state university nearby,
8 or they might decide to go to a beautiful small college. All
9 kinds of different reasons why people would turn us down.

10 And typically almost 20 percent in recent years of
11 the students roughly will turn us down to go elsewhere.

12 **Q.** Now, let's go from the numbers to the materials that you
13 considered. And I think on a number of occasions you told
14 Mr. Hughes that the admissions office considers all the
15 information in the file. Is that what you said?

16 **A.** That's correct.

17 **Q.** We're going to go through the information in some detail,
18 but let me ask you this: Who submits the information that
19 ultimately ends up in the file?

20 **A.** The student submits quite a bit of information, but then
21 there's a lot of other information coming in from outside
22 sources such as the teachers and the counselor. People maybe
23 with whom the student had worked over the summer or
24 employers. There's loads of information coming in from the
25 outside.

1 **Q.** What information is submitted by the student him or
2 herself?

3 **A.** It would really be the common application. We were
4 actually the first of our kind to get into the common
5 application in the mid '90s. And the idea was to --
6 especially for a busy, stressed-out student and especially
7 those who perhaps are facing economic obstacles at home, we
8 felt it would be good to go to the common application because
9 it's easy for them to fill that out and then apply to a whole
10 variety of other good places at the same time.

11 **Q.** Now, just in general terms, because we're going to look
12 at it specifically, what information is submitted by others
13 other than the student?

14 **A.** We require the two teacher reports, and of course we
15 require the guidance counselor report along with a
16 transcript. But you could just about get anything. Lots of
17 students will work term time or during the summer or they'll
18 do research or other kinds of things in the school year or
19 the summer. So that information comes in. Just about
20 everything you can imagine.

21 **Q.** Now, let's, before we get to the specifics of the files,
22 I want to ask you something about this concept of tips that
23 Her Honor and the rest of us have heard about. What is a
24 tip?

25 **A.** A tip would be a factor that might influence our readers

1 to vote yes in the end. You'd look at something and say,
2 well, gee, that would make this particular person a
3 particularly interesting educator of others and classmate.
4 But it could be anything.

5 **Q.** Is it also sometimes referred to as a plus factor?

6 **A.** Yes.

7 **Q.** Is a tip ever a negative factor?

8 **A.** Never.

9 **Q.** Now, turn, if you would, to Tab 3 in your notebook. Do
10 you have that before you?

11 **A.** Would this be the application review process?

12 **Q.** No.

13 **A.** Tab 3. I'm sorry.

14 **Q.** Tab 3 should be DX5.

15 **A.** Yes.

16 **Q.** This is the interviewer handbook. Do you see that?

17 **A.** I do.

18 **Q.** We saw excerpts of the interviewer handbook for 2013-2014
19 when Mr. Hughes examined you. I'll represent to you that
20 this is a complete version of the interviewer handbook.

21 Do you recognize it?

22 **A.** I do.

23 **Q.** What is it used for?

24 **A.** We use it, of course, for our 10,000 interviewers. We
25 also use it for our own staff, obviously for their training.

1 It's a very useful, quick kind of summary of what we do.

2 MR. LEE: Your Honor, we offer DX5.

3 MR. HUGHES: No objection, Your Honor.

4 THE COURT: Admitted.

5 (Defendant Exhibit No. DX5 admitted.)

6 BY MR. LEE:

7 Q. Turn, if you would, to the page at the bottom that says
8 DX005.0009.

9 Do you have that before you?

10 A. I am one page away. Yes.

11 Q. Just remind us. This is something that you send out to
12 the 10,000-plus people involved in the admissions process?

13 A. That's correct.

14 Q. Is it available to your 40 admissions officers each year?

15 A. Yes. And it's used obviously in the training as well.

16 Q. Now, there's a category called "The Search For
17 Distinguishing Excellences."

18 Do you see that?

19 A. I have it.

20 Q. What is a distinguishing excellence in the Harvard
21 admissions process?

22 A. Well, if I could read just a little bit of it. We talk
23 about our goal is to attract the best students to the
24 college.

25 Q. Dean Fitzsimmons, you are going to have to go slower if

1 you're going to read or the court reporter will kill both of
2 us.

3 **A.** Sorry. I'll make sure the Boston accent is correctly
4 applied.

5 **Q.** You don't have to read it because it's in evidence. But
6 just in general terms, what's a distinguishing excellence?

7 **A.** It would really be excellences of all kinds. It could be
8 academic. It could be, for example, musical. You know,
9 Yo-Yo Ma, the cellist, went to Harvard. In recent years we
10 might get 2,200 music CD's and resumes sent in, and we'll
11 take a look at them, and then we'll pass the best ones on to
12 faculty. And then they'll tell us again on a 1 through 4
13 scale who might be truly excellent musically. So it could be
14 anything, really.

15 **Q.** Now, turn, if you would, to the next page. Do you see
16 the first sentence of the first full paragraph?

17 **A.** Yes.

18 MR. LEE: I'm going to ask Mr. Lee to highlight
19 that.

20 BY MR. LEE:

21 **Q.** And I am this time going to ask you to read it to us.

22 **A.** "The admissions committee values objective criteria but
23 holds a more expansive view of excellence."

24 **Q.** Is that true?

25 **A.** That's very true.

1 **Q.** And is it an accurate description of the real process
2 that's used to admit students at Harvard?

3 **A.** Absolutely.

4 **Q.** All right. Then there's a reference to test scores and
5 grades indicating academic aptitude and achievement.

6 Do you see that?

7 **A.** Yes.

8 **Q.** That's true, is it not?

9 **A.** It is.

10 **Q.** Then would you read to us the next sentence from the
11 handbook.

12 **A.** "The committee also scrutinizes applications for
13 extracurricular distinction and personal qualities."

14 Keep reading?

15 **Q.** Yes, please.

16 **A.** "Students' intellectual imagination, strength of
17 character, and their ability to exercise good judgment.
18 These are other critical factors in the admissions process,
19 and they are revealed not by test scores but by students'
20 activity outside the classroom, the testimony of teachers and
21 guidance counselors, and by alumnae/alumni interview
22 reports."

23 **Q.** Let's stop there. Is that an accurate description of
24 what the admissions office is looking for, at a high level?

25 **A.** Yes.

1 **Q.** Now, in the handbook you specifically identify some
2 things that you're positively looking for in applicants.

3 **A.** Yes.

4 **Q.** Now, turn, if you would, to page 10 of DX5. And I'm
5 going to draw your attention to the third paragraph of this
6 page. Do you have it before you?

7 **A.** Page 10, yes.

8 **Q.** There's a sentence that begins "Tips." Would you read
9 that sentence for us. Mr. Lee will highlight it for you.

10 **A.** Yes. "Tips come into play only at a high level of merit.
11 The committee never gives enough of a tip to admit an average
12 candidate at the expense of a first-rate one. These are
13 among the most common tips by which applicants presenting
14 distinguished academic and extracurricular records might
15 distinguish themselves for admission."

16 **Q.** I want to ask you about that first sentence, "Tips come
17 into play only at a high level of merit."

18 First, is that true?

19 **A.** Absolutely true.

20 **Q.** What does it mean?

21 **A.** It really means that you have to be highly competitive
22 really across the board before you really will be in
23 contention for a place in the class, at which point having a
24 tip of one kind or another might help you get in, all other
25 factors substantially equal.

1 **Q.** There was a lot of reference to tips for race or ethnic
2 background during Mr. Hughes' examination you.

3 Do you remember that?

4 **A.** I do.

5 **Q.** Let's see what the list of tips is that's listed in the
6 notebook. What is the first tip?

7 **A.** "Outstanding and unusual intellectual ability."

8 **Q.** Now, given the academic success of the applicant pool as
9 you've just described to us, what makes someone outstanding
10 and unusual enough to get this tip from that very, very
11 qualified applicant pool?

12 **A.** It's really the ones at the very tip-top who will get,
13 for example, Harvard faculty reads that will say this is one
14 of the most promising poets in this generation or one of the
15 most promising mathematicians in this generation.

16 But it would be based on they perhaps would be
17 looking at, say, the person's poetry or the person's original
18 math. Then they'd look at the entire application to see the
19 recommendations and to see what other -- perhaps in the math
20 world, for example, this person was on either the national or
21 the international Math Olympiad team.

22 **Q.** What is the next tip that is expressly described in the
23 handbook?

24 **A.** "Unusually appealing personal qualities."

25 **Q.** And what are -- can you give us an example of an

1 unusually appealing personal quality?

2 **A.** Well, I'd say in a general kind of way we're looking at
3 people who have really made everyone around them better, say,
4 in their high school, in their family perhaps, in their
5 community. People who literally have in some cases really
6 made a difference, positive, big positive difference in other
7 people's lives so far, at least in terms of what the
8 application indicates from the reports.

9 And then we're also though -- we're in the futures
10 business. So the idea, too, is, okay, maybe they'll be great
11 roommates and make a huge difference over the four years
12 based on what they've done so far. But we're also trying to
13 do the impossible, I suppose, and trying to project them out
14 into the world later.

15 **Q.** Now, under this paragraph it says, "In certain cases
16 teacher recommendations, the secondary school report,
17 personal statement, and the alumnae/alumni interview report
18 offer consistent testimony of an applicant's unusual
19 effervescence, charity, maturity, or strength of character in
20 addition to academic and extracurricular accomplishments. A
21 residential community with strong emphasis on extracurricular
22 participation.

23 "As a residential community with strong emphasis on
24 extracurricular participation, Harvard prizes these
25 qualities." Is that true?

1 **A.** Very much so. Yes, it's true.

2 **Q.** And the next tip is what?

3 **A.** Outstanding capacity for leadership.

4 **Q.** The next tip is what?

5 **A.** Creative ability.

6 **Q.** And let's go to the next page. What is the next tip?

7 **A.** Athletic ability.

8 **Q.** There's been a lot of discussion about athletes. Why
9 does Harvard give a tip for athletes?

10 **A.** For a couple of reasons. One is having people, having
11 all of our students gather together, you know, for athletic
12 contests builds a spirit of community that I think many
13 students expect and I think they deserve. It really unifies
14 the institution in quite a specific and vital way,
15 remembering, of course, that Harvard has changed a lot since
16 my era.

17 So now our biggest state often is California. Our
18 fourth biggest is Texas. Our sixth biggest is Florida. So
19 if you're a kid coming from some of these areas, you want to
20 go to a place that is collegiate in the way Americans often
21 think of colleges. So having a vibrant athletic tradition
22 and ability to rally people around makes a big difference in
23 our ability to attract all kinds of students.

24 The other part of it is that people who have
25 achieved high levels of athletic expertise, if you want to

1 use that word, often have a commitment, a drive, and an
2 energy that often serves them well during college and then
3 well beyond.

4 **Q.** I'm going to ask you some more about the athletes and the
5 athletic ratings when we get to that.

6 But I want to ask you one thing. In SFFA's
7 opening, they suggested that the coaches or the athletic
8 department basically order you who to admit. Is that true?

9 **A.** Hardly.

10 **Q.** Does every athlete that gets admitted to the class get
11 reviewed and voted on by the 40-person admissions committee?

12 **A.** Absolutely.

13 THE COURT: Can I ask a question? This says about
14 tips that they come only into play at a high level. The
15 committee never gives a tip to admit an average candidate at
16 the expense of a first-rate one.

17 But didn't we see a chart earlier that said that
18 there's a big chunk of athletes and of legacies that wouldn't
19 get in but for that tip?

20 THE WITNESS: There are some who needed a tip to
21 get in. That's true.

22 But if you look at it in any sort of a national
23 sense, they're all very, very competitive in a national
24 sense. Our applicant pool, you saw the 8,000 people with
25 perfect grades and so on that you just saw. It's quite a

1 rarified pool in the end.

2 But there's room in lots of different ways for
3 people with lots of different abilities and skills to be
4 successful. And one of the things that is very important for
5 people who come from a variety of different backgrounds is
6 that they have -- in addition to their academic work, they
7 have extracurricular or maybe athletic niches where they can
8 meet other people and have a sense of identity. And in some
9 ways that helps achieve our usually 97-98 percent graduation
10 rate.

11 So it's a little different. You know, the athletic
12 academic credentials are somewhat lower. But the lineage of
13 the alumnae/alumni sons and daughters, their academic
14 credentials look almost exactly like the rest of the class.
15 So it's two very different pools.

16 BY MR. LEE:

17 **Q.** That was going to be my next question.

18 There's been a suggestion is that if you look at
19 the children of Harvard and Radcliffe alums, they're somehow
20 academically less qualified than either the rest of the pool
21 or the admitted pool. Is that accurate?

22 **A.** That's not accurate, actually.

23 **Q.** How does the lineage pool compare to the overall pool and
24 to the admitted pool?

25 **A.** Just simple kinds of things. The pool itself, they are

1 stronger than the average applicants certainly in the pool.
2 So they are certainly on academic credentials. When they're
3 admitted, the test scores and grades and things like that
4 literally are identical to the average for the Harvard class.
5 So indistinguishable.

6 THE COURT: I'm sorry. This is the perils of
7 having me do the summary judgment motions and all the other
8 motions as I sit on this trial.

9 Didn't I read someplace that the legacies are the
10 lowest-performing demographic at Harvard?

11 THE WITNESS: I don't think so.

12 MS. ELLSWORTH: I don't believe you did, Your
13 Honor.

14 THE COURT: I know you're like the collector of
15 facts over there.

16 MR. LEE: The answer is?

17 MS. ELLSWORTH: I'm not familiar with that as a
18 fact.

19 MR. LEE: And I actually think it's not the fact.

20 BY MR. LEE:

21 **Q.** Do you know, Dean Fitzsimmons?

22 **A.** What we know is this, and you would expect it: These are
23 a very self-selecting group because lots of them will not
24 apply if they're -- because for two reasons.

25 One, some of them don't want to go where their

1 parents went. Another is that they are -- many of them go to
2 very good public and private schools. They're very well
3 prepared. And oftentimes their guidance counselors are very
4 good at telling them not to apply to Harvard even if they may
5 well be able to get in, especially if they may be a better
6 match for a different kind of school; for example, for a
7 smaller school, as often happens. I think you yourself,
8 Mr. Lee, have seen that with two of your children.

9 And so it's a very -- by the time they get through
10 thinking about whether or not they're going to apply to
11 Harvard, they're a very, very strong group. This is true at
12 similar institutions as well, not just at Harvard.

13 **Q.** And from where you sit in the process, if you look at the
14 lineage applicants and compare them to the rest of the
15 applicants who are admitted, are they, as SFFA suggested,
16 academically weaker?

17 **A.** No, no. A very large percentage of them -- again,
18 because there is self-selection and good advice coming to
19 them, a very large percentage of them would have gotten in
20 without the tip. And that's the way a lot of these so-called
21 tips work. Many times you don't need the tip, actually.

22 **Q.** Why does Harvard give a tip to children of alumni?

23 **A.** I have think there are several reasons, and some of which
24 have been touched upon already.

25 One of them is, of course, just think of our 10,000

1 alumnae/alumni who help us with what we call schools and
2 scholarship work. They interview a very, very large, well
3 over half the students who apply to Harvard each year.

4 They often will go to college nights for us. In
5 recruitment they'll visit secondary schools for us. They
6 hold parties for admitted students. They do all kinds of
7 good things in that world. So that's one piece of it. So
8 when their sons and daughters apply, we're going to look very
9 carefully.

10 Another piece is that many of the alumnae/alumni,
11 again feeling a very special part of the Harvard community,
12 they will be part of Harvard Club activities that promote
13 Harvard across the country and across the world and put loads
14 of time into it.

15 The third part is people who give money and raise
16 money for Harvard. I certainly would not have been able to
17 go to Harvard without the -- obviously the scholarship, the
18 need-based scholarship I had. And this is a huge part of --
19 Harvard is trying very hard -- we've expanded our financial
20 aid program dramatically over the past 15 years. We still --
21 we're always a work in progress.

22 So we would like to do even better. You think that
23 after the capital campaign we'd be all set, and we're not.
24 We're only about two-thirds endowed for financial aid.

25 So there's lots of other things obviously our

1 alumnae/alumni are interested in helping us. And our faculty
2 conduct cutting-edge research and create an academic
3 environment that will make the most of these talents of the
4 students who come to Harvard. So that's certainly a part of
5 what we do.

6 And I think the moment you're admitted to Harvard,
7 and I would guess this is true at lots of different colleges,
8 you're part of our community forever. And we hope you have a
9 special feeling about the place. And many people because of
10 this special feeling will continue to help Harvard in various
11 ways throughout their lives.

12 **Q.** Do the lineage applicants go through a different
13 admissions process?

14 **A.** Not at all.

15 **Q.** Are they reviewed by the same committee?

16 **A.** Absolutely.

17 **Q.** And I think you said this in partial answer to
18 Her Honor's question. For many of the lineage candidates who
19 are admitted, do they need the tip?

20 **A.** No.

21 **Q.** Now, does Harvard also give a tip to children of Harvard
22 faculty and staff?

23 **A.** We do.

24 **Q.** Why?

25 **A.** Because one of the most important things -- they always

1 say Henry Rosovsky, one of our former great deans, still
2 going strong, always said there are only two things you need
3 to do to have a great university. One is to have great
4 students, and the other is to have great faculty.

5 And so this is -- the idea is that try to attract
6 faculty to Harvard, the best faculty in the world is
7 obviously critically important to our institutional goals.

8 So that when -- and again, it's not just that they
9 teach. A lot of them help around our houses. The faculty
10 deans of our houses, Doug Melton, who is one of the great
11 researchers in the world for stem cell research, runs one of
12 our houses in addition to doing world-class research.

13 I think one of the things -- they're a huge part of
14 our community. And when their sons and daughters apply, we
15 feel it's important to look very carefully at them and, if we
16 can, try to act positively. But if not, not admit them and
17 do it in a very sensitive way.

18 **Q.** Now, do the children of faculty and staff go through a
19 separate admissions process from other applicants?

20 **A.** Not at all.

21 **Q.** The last tip listed here is geographic, ethnic, and
22 economic factors. Do you have that in mind?

23 **A.** I do.

24 **Q.** Now, you've talked about geographic factors already, so
25 I'm not going to ask you about those. Is the economic tip

1 the socioeconomic or low-income tip that you've described
2 before?

3 **A.** Yes. And I think it's one of the things in a country
4 that is so segregated economically, and in some ways with our
5 social classes even coming further apart, one from the other,
6 I think it's more important than ever to have people from
7 low- and modest-income backgrounds, from blue collar
8 backgrounds, from first-generation backgrounds, to be at
9 Harvard and to -- first of all, to have an opportunity to
10 make a difference in the world with the education. But also,
11 frankly, to make sure that their classmates understand what
12 America is really like. And it will make their classmates
13 better, and I think it will make them better for mixing with
14 people from all economic backgrounds.

15 **Q.** Now, the last tip that I haven't discussed with you is
16 ethnic or race, correct?

17 **A.** Yes.

18 **Q.** And Mr. Hughes asked you why Harvard gave a tip for race,
19 and you answered that yesterday, so I'm not going to ask you
20 again.

21 Let me ask you this: Is this list of tips a
22 complete list of tips?

23 **A.** No, not really.

24 **Q.** Does any one tip guarantee admission to a candidate?

25 **A.** Not at all.

1 **Q.** Go to Her Honor's question. Can the presence of a tip
2 make a difference in admission?

3 **A.** It can, again among fully qualified students, all other
4 factors substantially equal.

5 **Q.** Is race or ethnicity ever a negative tip?

6 **A.** Never.

7 **Q.** Is anyone ever excluded from the class because of their
8 race?

9 **A.** Never.

10 **Q.** Turn, if you would, to DD 1.4, which is at Tab 2, which
11 is demonstrative Number 4. Let's put a little more meat in
12 the bones around the actual process that results in this
13 class of 1,600 or so.

14 Do you see DD 1.4?

15 **A.** I do.

16 **Q.** What is it?

17 **A.** It gives a quick overview of the phases of the admissions
18 process.

19 **Q.** And every applicant -- athlete, legacy, children of
20 staff, children of faculty, dean's list, someone not on those
21 lists -- they're going to go through this process, right?

22 **A.** Exactly the same process.

23 **Q.** Now, what is the first step in the process?

24 **A.** It's just a very simple one, and that's to try to get our
25 applicants into manageable subcommittees or dockets, as we

1 call them.

2 **Q.** So if I go to demonstrative 1.5, let's see if we can take
3 us to -- actually demonstrative 1.6, in the interest of time.

4 What does that show us?

5 **A.** This gives you a rough idea of what the docket's like.

6 **Q.** Are admissions officers assigned to specific dockets?

7 **A.** Yes, they are.

8 **Q.** How many are assigned to each docket?

9 **A.** Typically five to seven with a chair.

10 **Q.** And when an application comes in, is it assigned to
11 someone in a docket?

12 **A.** Yes. And that someone has the job of being the advocate.

13 **Q.** Does that someone read all the applications from the same
14 high school?

15 **A.** That's correct.

16 **Q.** And why are those applications assigned in that manner?

17 **A.** Partly because we want to understand -- it's a little bit
18 like Her Honor's contacts case question, actually.

19 And that is it's important for us to always
20 understand the context of we have an applicant, but the
21 applicant from this kind of a family background goes to this
22 particular school in this kind of community.

23 We also are looking how others at the school have
24 done based on the profile in the secondary school report.

25 But we also can see the other applicants from the school and

1 get a sense of what kinds of people at least their school is
2 sending our way this year.

3 So it's important that the advocate and the other
4 people, including the chair of the docket, have a good sense
5 of that area and perhaps even that particular school.

6 **Q.** Turn, if you would, to Slide 1.7, DD 1.7.

7 Once the applications are assigned, what's the next
8 step?

9 **A.** The next step is for the advocate to do the first read.
10 I won't bring you through the whole process because I think
11 we're going to see -- I don't know whether we will. I don't
12 want to take too long.

13 The idea is that as first reader you are supposed
14 to look at that application in its entirety and then do a
15 bunch of ratings and so forth and then a write-up at that
16 point. One of the issues that first readers always face is
17 that there's often lots of information that comes in after
18 they do their profile, after they do their preliminary
19 overall rating, and so on.

20 For example, the interview might not be there. The
21 second teacher report might not be there. The outside
22 recommendations from the employer or the research and so
23 forth. So it's a moving target. The first time is a first
24 look with what's in the folder then, and it kind of sets it
25 up at least with what we see so far.

1 **Q.** I'm going to go into the information in a little bit more
2 detail. Can the application be reviewed by anyone in
3 addition to the first reader?

4 **A.** Yes. Very much so. Often the chair will do what we call
5 a third reading. But if you're a -- let's say you're new to
6 this area and you would like to get a second reading, we
7 would call it from a person who had covered that area before
8 who might know the school a little bit better. You can do
9 that before it goes on to the third reader.

10 You could often have -- often will have a faculty
11 reading either in terms of having an expertise reading or
12 simply a faculty member who would be interested in reading,
13 let's say, I don't know, eastern Massachusetts applicants.

14 **Q.** So now let's talk about what happens during the first
15 reading. I think you told me at that moment in time the file
16 may not be complete.

17 **A.** That's correct.

18 **Q.** So let's turn to DD 1.9, and let's look at the ratings.

19 Mr. Hughes asked you about some of them but I don't
20 think about all of them. So I'm going to take you through
21 them. There are three different categories of ratings on the
22 summary sheet, correct?

23 **A.** That's correct.

24 **Q.** So what are the profile ratings?

25 **A.** The profile ratings would be the academic,

1 extracurricular, athletic, and personal ratings.

2 **Q.** What are the school support ratings?

3 **A.** These would be the two teacher recommendations and the
4 counselor recommendation.

5 **Q.** What are the other ratings?

6 **A.** It would be the interview ratings, whether it was staff
7 and/or alumnae and alumni. And then finally there would be
8 the preliminary overall rating.

9 **Q.** And these are completed during this first read, if
10 possible, correct?

11 **A.** That's right. Each reader, no matter whether first,
12 second, third, fourth, whatever, should fill these out.

13 **Q.** And remind us the scale is -- except for
14 extracurriculars, what is the scale for the profile ratings?

15 **A.** It's 1 to 4. Extracurricular you can have a 5 if work or
16 family obligations get in the way.

17 **Q.** So the 5 rating for extracurriculars is to allow for the
18 circumstance where family or personal circumstance might not
19 allow you to participate in the extracurriculars that someone
20 might otherwise do?

21 **A.** Or could be a disability of one sort. It's actually a
22 very positive rating because it does imply something a little
23 bit out of the norm.

24 **Q.** All right. So let's talk about what goes into the
25 academic rating.

1 MR. LEE: Could I have slide DD-10, please.

2 BY MR. LEE:

3 Q. Now, do you see that we've highlighted the box in red and
4 then highlighted them in yellow? Do you see that?

5 A. I have.

6 Q. On this summary sheet -- so Her Honor knows, how many
7 readings have there been?

8 A. There have been two readers so far.

9 Q. One is EJB on November 6 and one is CGM on November 8,
10 correct?

11 A. That's correct.

12 Q. And the four profile ratings are the ones that begin with
13 the two plus box that's highlighted, correct?

14 A. That's right. That's the academic rating.

15 Q. Now, what are the factors that can be considered in the
16 academic rating?

17 A. There are many. Obviously test scores and grades --

18 THE COURT: What's that box to the left?

19 THE WITNESS: That's the preliminary overall
20 rating. So EJB gave a two plus and then the chair, CGM, gave
21 it a 1. So this is a very outstanding application, according
22 to their profiles.

23 So anyways, you wanted the academic.

24 BY MR. LEE:

25 Q. Yeah. Just to level -- is it right if I start with two

1 plus that's highlighted, that's the academic rating, the next
2 1 is the extracurricular rating, the next 4 is the athletic
3 rating, and the 2 plus is the personal rating?

4 **A.** That's correct.

5 **Q.** And just to be clear, when someone is sitting down as the
6 first reader to fill out these boxes, it's the same person
7 that's filling out these four boxes, isn't it?

8 **A.** That's correct.

9 **Q.** It's not someone filling out the first two and someone
10 filling out the fourth, right?

11 **A.** That's correct.

12 **Q.** Okay. Back to the academic rating, in general terms. I
13 don't want to go too far into the details given the hour of
14 the day.

15 **A.** Yes, I understand.

16 **Q.** In general terms, what goes into the academic rating?

17 **A.** It really is, the simple thing is the test scores and
18 grades at the beginning. But then you read really carefully
19 about what teachers and counselors have to say about things
20 such as creativity, love of learning, things of that sort,
21 how unusual in the context that person might be.

22 Then you would look at any outside academic
23 evaluations, researchers and so on, and then perhaps faculty
24 evaluation.

25 **Q.** Is the academic rating based upon a formula?

1 **A.** No, not at all.

2 **Q.** Are there factors that go into the academic rating that
3 are not quantitative?

4 **A.** Many.

5 **Q.** And are some of them the examples that you just gave us?

6 **A.** Very much so. And also just because you are also -- it's
7 not just looking at what the person has done so far. You're
8 trying to project, I guess, future potential, growth. And
9 that's a big piece of it. Love of learning, a person who's
10 demonstrated an ability to grow and learn and make absolutely
11 the most of academic opportunities. People who would love to
12 talk to you for hours about their love of physics, for
13 example. It's that kind of a thing that probably is going to
14 produce that upward growth curve during college and beyond.

15 THE COURT: Can you blow up the left-hand side of
16 the screen for me just so I can see it? I can't see it on
17 the screen. Further left. Can you blow it up a little bit
18 more?

19 MR. LEE: Your Honor, if it's all right with you --

20 THE COURT: I can't see it on the paper or on my
21 book.

22 MR. LEE: We can get a hard copy.

23 THE COURT: Bigger than the hard copy that I
24 already have?

25 MR. LEE: That, I don't know.

1 MS. ATTORNEY: It's at Tab 6 of her binder.

2 THE COURT: I just wanted to see what it is. Thank
3 you. Go ahead.

4 THE WITNESS: I'm sorry, Your Honor. Did you have
5 questions on that?

6 THE COURT: No. I just wanted to be able to see
7 it.

8 THE WITNESS: It's a little bit of a test for my
9 reading glasses.

10 MR. LEE: I think Her Honor wanted to see what was
11 on the left.

12 THE COURT: I have it. They don't give you this
13 job until you're old enough for your eyesight to fail and you
14 can't see it.

15 BY MR. LEE:

16 Q. Dean Fitzsimmons, does the fact that an applicant has
17 identified a certain race or ethnicity per se or in isolation
18 factor into the academic rating?

19 A. No, not at all.

20 Q. All right. What is the next profile rating? So if we
21 move from left to right, there are two 1's here.

22 A. Yes, there are two 1's.

23 Q. What rating is that for?

24 A. That's the extracurricular rating.

25 Q. And you told me the scale for that is 1 to 5, correct?

1 **A.** That is correct.

2 **Q.** Is there a formula for the extracurricular rating?

3 **A.** No, not at all.

4 **Q.** In general terms, what are the factors that are going
5 into the extracurricular rating?

6 **A.** In conventional terms in this particular one, if your
7 eyesight is working well you can -- this is a very good
8 dancer, as an example. And also somebody who had been really
9 a leader across the board. She's just an absolute dynamo, it
10 appears. Anybody with a 1 extracurricular is really
11 something special.

12 But it could be anything. There are any number of
13 conventional extracurricular activities you could think of I
14 think in any high school, but there are also other kinds of
15 things. Suppose you were active say in your local temple or
16 your local church or community organization or had been
17 active in some regional or national organization.

18 So extracurricular covers the -- I suppose you'd
19 say the energy, drive, and commitment this person puts into
20 nonacademic things. But it could be anything.

21 **Q.** Would it include commitment to community organizations,
22 for instance, outside of school?

23 **A.** Absolutely.

24 **Q.** Now, the factors that go into this rating, are they
25 qualitative as well as quantitative?

1 **A.** Yes.

2 **Q.** Does the race, self-identified race of an applicant in
3 isolation per se factor into the extracurricular rating?

4 **A.** Not at all.

5 **Q.** Now, the next rating is the athletic rating?

6 **A.** Yes, it is.

7 **Q.** And there's a 4 and a 5 here?

8 **A.** Yes.

9 **Q.** Setting aside the numbers here, what is the athletic
10 rating attempting to measure?

11 **A.** It would be, I guess, again the energy, drive, and
12 commitment put into athletics. We've already talked about
13 what a 1 is, I think. So I won't go over that.

14 **Q.** I actually wanted to ask you because I'm not sure it's
15 100 percent clear. Who gets a 1 on the athletic rating?

16 **A.** That would be someone who's identified by one of our
17 coaches as a potential varsity participant.

18 **Q.** Now, the fourth rating which goes 2 plus 2 plus --

19 **A.** Yes.

20 **Q.** -- is what rating?

21 **A.** Is the personal rating.

22 **Q.** And Mr. Hughes asked you some questions about it, and
23 because it's been a focus, I want to ask you about it. What
24 is the personal rating?

25 **A.** Again, if you had read through this application and you

1 had sort of tried to figure out what kind of a positive
2 difference this person had made to others in her school,
3 outside her school, to her family, across the board, what
4 kind of a person is this as far as, I would say, maximizing
5 the experiences of everyone around her.

6 That's kind of what you're looking for. There's no
7 formula to it. It could be almost in any setting. I'll give
8 you an example because I used to work dorm crew, so it's near
9 and dear to my heart.

10 Probably the best recommendation, one of the best
11 I've ever read was from the janitor at a high school because
12 this person had worked in the school's work program to help
13 pay tuition. And what this person said about how the student
14 just lit up a room. At the end of the day, everybody's tired
15 and they've got a lot of stuff to do to clean the school --
16 anyway, it was brief. But you said to yourself on a dismal
17 day, this is the kind of person you want with you and the
18 kind of person you'd want with you, as they say, in any tough
19 situation.

20 **Q.** Is the information that goes into the personal ratings
21 supplied in part by the student?

22 **A.** You can get a sense sometimes, yes, from -- first of all
23 not just what the person says, for example, in the essay or
24 essays, because that can help obviously. But also by what
25 the person does and what the person has actually

1 accomplished.

2 It's one thing to say what you're doing in an
3 essay. It's another thing to look at what this person has
4 accomplished just in terms of action. So it's a whole
5 variety of different things.

6 **Q.** Is some of the information provided by school guidance
7 counselors and teachers?

8 **A.** Very much so because they've usually spent a lot of time
9 with the student. In some cases the teachers have taught the
10 student for two or three, sometimes four classes. So they
11 get to know the student very well on a day-to-day basis. And
12 some of the counselors really go out of their way to get to
13 know the students well.

14 And they also have, in a sense, a bit of a
15 comparative perspective sometimes because they can calibrate
16 again what kind of a difference -- how unusual this student
17 is in this particular high school.

18 **Q.** And do you also consider information provided by other
19 recommenders and other sources?

20 **A.** Very much so. We're in the information business. So
21 whatever comes in, we're going to look at it. And that
22 information, for example, the one from the janitor, can be
23 really, really helpful. And again, part of it is
24 corroborating all the pieces of the application.

25 So it's like anything else, no one thing is going

1 to do it. But it's really in combination.

2 **Q.** Now, does the fact that an applicant has self-identified
3 as a specific race or ethnicity factor in isolation or per se
4 to the personal rating?

5 **A.** No, not at all.

6 **Q.** Can circumstances related to someone's race or ethnicity
7 result in facts, circumstances, or events that are useful in
8 assigning the personal rating?

9 **A.** Sure.

10 **Q.** Can you give us an example?

11 **A.** There are plenty of examples of students who have faced
12 enormous prejudice in all kinds of different ways in their
13 secondary school setting or in their communities. And what
14 they have done as a result with this issue, what they've done
15 to overcome the challenges or the challenge or whatever it
16 might be, can illuminate what kind of a person this is in
17 terms of how that person would again perhaps face any kind of
18 an obstacle in college and later.

19 **Q.** There's been a suggestion that the personal rating is a
20 personality rating. Have you heard that?

21 **A.** I have.

22 **Q.** Is it right?

23 **A.** It is not.

24 **Q.** What's the difference?

25 **A.** It's really -- I guess I'd go back to the doing as

1 opposed to self-promotion. There are plenty of people who
2 can stand up and give a wonderful speech who might actually
3 not be very good people in the long term. I'm just using a
4 stark example there.

5 Where it's really much more what a person has done
6 and evidence, say, from everything in that application that
7 would indicate that this person has made everyone around him
8 or her better and has the potential to do that throughout the
9 rest of his or her life. So it really is -- it's really a
10 set of demonstrated achievements along with real testimony
11 across the board from people who know the student well.

12 **Q.** Let's go to the next couple of ratings. Turn, if you
13 would, to DD 1.14 in Tab 2. Do you have those?

14 **A.** Yes.

15 **Q.** What do these ratings reflect? And perhaps you can
16 explain to Her Honor why one of them has four ratings rather
17 than three.

18 **A.** Yes. So here we have -- again, I think Your Honor had a
19 question before about Teacher 1, Teacher 2. It just simply
20 happens to be which one was read first by the reader.

21 The first teacher considered by EJB was an
22 off-the-charts 1, one of the best students I've ever had kind
23 of thing. The second teacher, she rated as a 2 plus. Again
24 very good, one of the best perhaps in five or ten years.

25 The secondary school counselor report is the third

1 one, and that's a -- it's usually from the guidance
2 counselor. It can be from others at the school representing
3 the school. And that's -- again, that's the one there.

4 And then the additional one was from an outside
5 recommendation. So we've got space there at least to code a
6 couple of outside recommendations.

7 **Q.** Now, are these teacher recommendations, counselor
8 recommendations, outside recommendations important to your
9 process?

10 **A.** They're very important.

11 **Q.** Are they important to setting the academic rating, the
12 extracurricular rating, as well as the personal rating?

13 **A.** Absolutely.

14 **Q.** And any of these pieces, any of these recommendations or
15 letters have information relevant to any of those ratings?

16 **A.** They almost always have information about all three.

17 **Q.** Now, do some applicants also interview with a Harvard
18 alum?

19 **A.** They do.

20 **Q.** And do the alumni interviewers assign ratings in the same
21 profile ratings we've just discussed?

22 **A.** They do.

23 **Q.** And do they also assign an overall rating?

24 **A.** They do.

25 **Q.** Now, when the alumni are doing the ratings and the

1 interviews, do they have all of the information that your
2 readers have?

3 **A.** They don't.

4 **Q.** What do they not have, in general?

5 **A.** Just about everything. They get a chance to meet the
6 student and talk for 45 minutes or an hour and then fill out
7 the form. They get trained, but they don't have teacher
8 reports, counselor reports, transcripts, or anything like
9 that.

10 **Q.** And where on this form is the rating for the interview
11 rating?

12 **A.** It would be over on the right. It's the person the alum
13 had given her a 1 personal and a 1 overall.

14 **Q.** Now, do some applicants also interview with a member of
15 the admissions staff?

16 **A.** Yes.

17 **Q.** Is any applicant able to request an interview with the
18 admissions staff?

19 **A.** Yes.

20 **Q.** Is anyone who asks for an interview ever denied an
21 admission?

22 **A.** Once the spaces fill up, the answer is yes. But the
23 spaces are open, and then we do our best. Remember we're on
24 the road a lot in the fall. Then we're right into early
25 action, which the deadline is coming up actually November 1.

1 **Q.** Does the staff ever request an interview with an
2 applicant?

3 **A.** Yes.

4 **Q.** In what circumstances would you ask to see an applicant?

5 **A.** I chair the local subcommittee, eastern Massachusetts.
6 If you're looking on your materials, that's P docket. So we
7 will -- let's say we find somebody very interesting and a
8 real possibility, but sometimes it might be useful for one or
9 more of us to see the applicant in the office. So we'll
10 invite the person in.

11 We'll sometimes travel, actually have a staff
12 person travel to other places to do this.

13 **Q.** Now, the final rating is a preliminary overall rating,
14 correct?

15 **A.** That's correct.

16 **Q.** And that's on the far left-hand side; is that correct?

17 **A.** That's correct.

18 **Q.** Is the preliminary -- it's called the preliminary overall
19 rating, correct?

20 **A.** That's correct.

21 **Q.** Why is it called preliminary?

22 **A.** Because it is incredibly preliminary because we haven't
23 even talked about this person yet in committee and even in
24 the subcommittee. The real decision is going to be made by
25 the 40 people in the full committee. And we also know there

1 will probably be lots of additional information coming in, as
2 there often is.

3 **Q.** Can the preliminary overall rating take into account the
4 self-identified race of an applicant?

5 **A.** It can.

6 **Q.** If an application is passed on for additional reviews,
7 does each additional reader rate the application according to
8 these same categories?

9 **A.** Yeah, that's correct.

10 **Q.** And as the application moves through the process, how are
11 these ratings used in general?

12 **A.** They're used as kind of a starting point. You know, in
13 Weymouth where I come from, we call it jacks are better to
14 open, in poker.

15 But the idea is that it's a place to start. This
16 is what the reader saw when they first laid eyes on the
17 application. But typically there's a lot that's going to
18 happen, a lot that's going to happen as the committee
19 meetings evolve.

20 **Q.** Are the other ratings summed or basically put into some
21 formula that find their way into the preliminary overall
22 rating?

23 **A.** Not at all.

24 **Q.** Is any one of these eight ratings that we've looked at
25 given more weight than others?

1 **A.** No.

2 **Q.** Do the ratings themselves dictate admissions decisions?

3 **A.** No. And they kind of fade into the background. Because
4 remember, when people are actually looking at making
5 decisions in subcommittee and full committee, every single
6 piece of the application, common application,
7 recommendations, everything go up on a screen for all -- say
8 in the subcommittee five to seven people, literally they're
9 all going to read the application. Literally everybody reads
10 the application with any new information in it. Then they'll
11 discuss. Then they'll vote. And then you kind of go from
12 there.

13 It's the same thing in the full committee. All 40
14 people get a chance to read the application and then to make
15 a decision.

16 MR. LEE: One final question and then, if it's all
17 right with Your Honor, it would be a good breaking point.

18 BY MR. LEE:

19 **Q.** In your experience, has an applicant with lower, meaning
20 worse, preliminary ratings and profile ratings actually
21 gotten admitted to Harvard while an applicant with higher or
22 better profile ratings did not?

23 **A.** It happens all the time. Because again, unless the
24 committee -- the committee is really looking at the materials
25 when they're making a decision. The preliminary stuff gets

1 left in the background. They can make up their own minds,
2 for example, when they're looking at all the material whether
3 or not that counselor report really was a 1 because they're
4 going to see it.

5 They know that the reader suggested it was a 1, but
6 they're actually going to look at the stuff.

7 **Q.** Do admissions officers from time to time simply disagree?

8 **A.** Disagree?

9 **Q.** Disagree on what a particular recommendation is?

10 **A.** Absolutely.

11 MR. LEE: This would be a good stopping point.

12 THE COURT: One more question. If all 40 people
13 look at 40,000 applications, there must be some chunk at the
14 bottom that gets lopped off.

15 THE WITNESS: That's correct. But not lopped off.
16 So when we get to -- let's say in full committee we'll come
17 to, let's say, P docket, the docket I chair. So everybody
18 will have the paper docket. We call official number 1 and
19 official number 2 that recorded what we did, and it's up on
20 the screen.

21 So let's say we come to High School A, for example,
22 without getting -- and we'd say, okay, I'm the area person.
23 I'd say, okay, well, here's the slate for you to look at.
24 Here are the people that applied from High School A. You can
25 see what their profiles look like. Because we actually do

1 the profiles and a lot of information about each of the
2 candidates in each of the schools we see.

3 So of the 10 applicants, you can see here that four
4 or five of them based on the information are not very strong.

5 So what I'm going to do is I'm going to talk to you
6 about two of them, and I need to get the late interviews for
7 three of them. But I'm now going to talk about the two of
8 them.

9 So then you would put -- for those two, you'd start
10 off by putting this reader sheet up on the screen, and then
11 you'd begin the discussion. You'd go right through the
12 entire application.

13 And what you have to do as the advocate is to
14 convince the members of the subcommittee to vote for the
15 person. Literally sometimes you will spend -- I know it
16 sounds not true, but sometimes you can spend an hour on a
17 single case in subcommittee before you can get to a tentative
18 decision. But even that is not even close to the final
19 decision because you know you're going to have to defend it
20 in the full committee.

21 So you're right. The way it works is you keep
22 winnowing down. Let's say for one of the people, the five
23 you weren't even thinking of, it didn't look very good on the
24 profiles. Suppose you get a whole new thing. Let's say you
25 get a great interview. Let's say you get now a terrific

1 music rating from our faculty or some other additional
2 information. Because people change and grow a lot senior
3 year in high school.

4 So by the time you get even to the end of the
5 subcommittee or certainly by the time you get into full
6 committee, that's an entirely different case. And the
7 advocate and the subcommittees have the responsibility of
8 making sure that everybody from their docket and from the
9 schools they cover get the best possible case made.

10 But it's a moving target all the way up to the last
11 day because you're comparing the kid from School A on P
12 docket to the kid from Ulaanbaatar in Mongolia or the kid
13 from the school in London. It's all a matter of comparing
14 and then voting on applicants, the ones you think are going
15 to be the best educators of others.

16 THE COURT: Each first reader is reading something
17 like a thousand applications?

18 THE WITNESS: It could be as many as 1,700. It
19 could be that high. Some of our staff members also do
20 financial aid. Some of them do anywhere from maybe 500 to up
21 to 1,100 applications. Full-time admission officer would
22 read usually in the neighborhood of 14 to 17 or 1,800,
23 depending on what other responsibilities they have. So you
24 do a lot of reading, and so you get lots of experience.

25 And as much as we love each other, though, we all

1 know that it's our job to make the best case for all of the
2 people we're presenting.

3 And so it is a matter of -- and you may vote for a
4 case -- all hear the case and you might vote for the case for
5 a couple of different reasons. You have vote for the case
6 for another different set of reasons. You never quite know
7 because you've got 40 people in the room. It is the most
8 thorough process that you could possibly devise.

9 We're also not just watching what each other did
10 with the ratings and whether or not somebody was too soft,
11 let's say, with a 1 rating. You're also making sure that
12 people are -- making sure they're presenting the case in the
13 best possible way.

14 I don't know if that answers your question.

15 MR. LEE: Can I ask one more question to follow up
16 on that?

17 THE COURT: Yes.

18 BY MR. LEE:

19 **Q.** To go to Her Honor's question. If someone is basically
20 saying I'm going to discuss two cases from P docket, if one
21 of the 39 other admissions officers says, "But I actually
22 want to discuss this person you're not recommending," can you
23 do that?

24 **A.** It happens all the time. And that's what the chair's
25 responsibility is, but also the other people who sit on the

1 docket. But even all 40 people, you can say, well, why
2 aren't we hearing this case, you know, that kind of thing.
3 So it's a very thorough -- and frankly, we're all checking
4 and balancing each other all the time.

5 MR. LEE: Thank you, Your Honor.

6 THE COURT: So the case is recessed for today.
7 We'll see you again tomorrow. Would you like to start at
8 9:30 again tomorrow?

9 MR. LEE: I think that would be great if we could.

10 THE COURT: I have a dispositive motion hearing at
11 3:30. I just can't push it any later and still have time to
12 do it. We'll end at 3:30 tomorrow. That's what we'll do.

13 MR. LEE: Thank you, Your Honor.

14 (Court recessed at 3:55 p.m.)
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